ISLAMIC RESEARCH AND TRAINING INSTITUTE

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The Islamic Research and Training Institute (IRTI) was established by the Board of Executive Directors of the Islamic Development Bank (IDB) in 1401H (1981.) The Executive Directors thus implemented Resolution No. BG/14-99, which the Board of Governors of IDB adopted at its Third Annual Meeting, held on 10 Rabi Thani 1399H (14 March 1979.) The Institute became operational in 1403H (1983.)

Purpose

The purpose of the Institute is to undertake research for enabling the economic, financial and banking activities in Muslim countries to conform to *Shari 'ah,* and to extend training facilities to personal engaged in economic development activities in the Bank's member countries.

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The functions of the Institute are:

(a) to organize and *coordinate* basic and **applied** research with a view to developing models and methods for the application of *Shari 'ah* in the fields of economics, finance and banking,

(b) to provide for the training and development of professional personnel in Islamic Economics to meet the needs of research and *Shari 'ah* observing agencies;

(c) to train personnel engages in development activities in the Bank's member countries;

(d) to establish an information center to collect, systematize and disseminate information in fields related to its activities; and

(e) to undertake any other activities which may advance it purpose.

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Address

P.O. Box: 9201, Jeddah 21413- Saudi Arabia
Telephone: 6361400
Telex: 601407- 601137
Fax: 637827/ 6366871
Cable: BANKISLAMI.

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ISLAMIC INSTITUTE FOR RESEARCH AND TRAINING

PHILOSOPHY OF ISLAMIC *SHARI'AH* AND ITS CONTRIBUTION TO THE SCIENCE OF CONTEMPORARY LAW

By

'Ala' Eddine Kharoufa

Eminent Scholars' Lecture Series

(19)

(Original in Arabic)

IN THE NAME OF ALLAH, MOST MERCIFUL, MOST BENEFICENT

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FOREWORD

***Praise be to 'Allah Almighty and Peace and Blessings be** Upon Muhammad and Upon his **Household** and Companions.*

In the world we are living in there are many disciplines and theories, which are spreading at an astounding speed. This speed is not due in all cases to particular attributes of the disciplines or to certain advantages they have over others. In many cases such speed is the outcome of an appealing presentation, which attracts the mind and captivates the intellect. The *Shari 'ah* of Islam whose source is from Almighty Allah - is the only unblemished and impeccable Truth. It is the Light, which guides mankind to righteousness.

From the outset, the mission of the Islamic Institute for Research and Training has been to present studies and researches in the fields of the application of *Shari 'ah* from the economic, financial and banking aspects for the benefit of Muslim societies. The purpose has been to highlight its benefits and emphasize its ability to cope with the problems of man in all times and ages.

Starting from this premise, during the month of Ramadan of every year, the Institute organizes a program of lectures on the basic aspects of *fiqh* which have a direct bearing on the infrastructure of contemporary Muslim economic thought.

The present study, namely, "Philosophy of Islamic *tashri'* (legislation) and its contribution to the science of contemporary law", was one of the lectures presented in the month of Ramadan, 1416H, by Professor Doctor `Ala' Eddine Kharoufa from the Faculty of Law, Islamic University of Malaysia. He is one of the few professors who combine academic and practical experience, in addition to his academic career as a judge for about fifteen years.

In this study, he tries to investigate the rationale of Islamic legislation, and to compare it positive civil and criminal laws. By so doing, he tries to prove the advantages of this legislation over those laws, as well as the shortcomings of positive laws and the pressing need for guidance by Islamic legislation.

I do not want to summarize this valuable study to our reader, nor do I wish to predispose any of its details. Rather, I will leave him to savor at his leisure the glory and magnificence of the *Shari 'ah.*

May Allah Almighty make this effort a beneficial addition to the Islamic library, a light on the way of seekers of truth and reform, and a guide to researchers in Islamic economics benefiting Muslims everywhere.

May Allah grant us success

Dr. Mabid Ali Al-Jarhi Director,IRTI

PREFACE

Praise be to Allah Almighty and Peace and Blessings be upon him who has been sent as mercy to mankind, and upon his household and companions and upon those who follow upon their footsteps until the Day of Judgment.

In this study, we have attempted to examine the philosophy of Islamic legislation and the spheres of its contribution to the science of contemporary law.

The title is very broad, and accordingly, I shall confine myself to the philosophy of Islamic legislation and its contribution to the science of civil and criminal law, for the term (law) is very broad and denotes all forms of law: civil, criminal, constitutional, administrative, public international and private international laws, law of the sea, environmental law (which has been the center of preoccupation of late, trial law (corporal and criminal.) Laws of *Shari 'ah* trials are included in the first two spheres.

It goes without saying that covering all these topics requires a lot of time and effort, and for this reason I shall confine myself to the topics I have stated.

I pray Allah Almighty to Help us in our work and to cause Islamic *Shari 'ah* to prevail in all societies.

Thanks be to Allah and to His Prophet Muhammad.

1416H-1995 **\`Ala' Eddine Kharoufa**

STUDY PLAN

The study includes an introduction, three chapters and a conclusion. The introduction will define legislation *(tashri) as* a term linguistically and legally, while the chapters will deal with the following topics:

Chapter one : Sources of Islamic *Shari 'ah*

Chapter two : Philosophy of Islamic *Shari 'ah*

Chapter Three: The contribution of Islamic *Shari 'ah* to the science of contemporary law

The conclusion will deal with the possibilities of applying Islamic *Shari 'ah,* and the aspirations of Muslims regarding it.

INTRODUCTION

The Meaning of Islamic *Tashri'*

The term *tashri ' is* derived from *Shari 'ah, a* verb often used in the Munificent Qur'an with the meaning to ordain. Says Allah: (He hath ordained for you that Religion which he commended unto Noah and that which We revealed to thee Muhammad.)' He also says: (For each We have appointed a divine law and a traced-out way),[2] and (now We set thee (0 Muhammad) on a clear road of our commandments; so follow it.)[3]

Accordingly, words *Shar'a, Shari 'ah* or *Shir'a* all mean that which has been revealed to Prophet Muhammad as Qur'an or *Sunnah* containing canonical laws which deal with the faith, morality and actions of competent persons in terms that are either definitive *(gat'i)* or open to interpretation *(zanni.)*[4] In this sense, *tashri'* would mean legislation.[5]

In *"Lisan Ul 'Arab",* the terms *Shari ah* and *Shir'a* refer to divinely ordained commands such as praying, fasting, pilgrimage, poor-dues *(zakat)* and all other virtuous acts; hence we have the Words of Allah: *(And now We set thee (0 Muhammad) on a clear road of our commandments.)*[6]

***Shari'ah* and *Din:* The Differences**

Now that we defined the term *Shari 'ah,* we would like, at this point, to dwell a little on the interpretations of words used by Muslim scholars. To them,

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1 *Surah Ash-Shura*, 13.

2 *Surah Al Ma'idah*, 18

3 *Surah Al Jathiyah*, 18. *Lisan Ul* Arab_reports Ibn Ul Arabi to have defined the term *Shari'ah* as meaning to show; says *Allah* in *Surah Ash-Shura*, Verse 21 "... made clear for them in religion that which *Allah* allowed not" *Shari 'ah* is also used to mean to reveal that which is right and to expose that which is wrong.

4 *Mawsu 'at al Fiqh al Islam!* (Islamic *Fiqh* Encyclopedia), Supreme Council on Islamic Affairs; Dar El Kitab Al Misri- Cairo & Dar Al Kitab Al Lubnani, Beirut; Vol. I, 1410H/ 1990, p. 13.

5 Dr. Shalabi, Muhammad Mustafa, *Madkhal iii Fiqh al Islami*, ad-Dar al-Jami'yyah, tenth ed.; 1405H/1985, p. 19.

6 Lisan ul 'Arab, Imam Abu Al Fadl Jamal ul *Din* Muhammad Ibn Karim Ibn Manzour Al Ifriqi Al Misri, Word *Shari 'ah*.

Shari 'ah incorporates all commands ordained by Allah relayed to his servants by any one of His Messengers.[7]

These commands are so termed because they are forthright, and for their enduring alignment to that which is right. If applied, by carrying out its dictates, and by *avoiding* its admonitions, *Shari 'ah would* be like fresh, clear water sought to revive peoples' bodies, spirits and minds.

When referring to *Shari 'ah,* it is important to note that, in Arabic, the word Islam means absolute surrender and a state of unblemished submission. *Shari 'ah Islamiyyah* means surrendering oneself to Allah's commandments and submitting to the Prophet's *Sunnah.* Says Allah: *(When his Lord said unto him: Surrender! He said: "1 have surrendered to the Lord of the Worlds.)*[8] *(And turn penitent to Your Lord and surrender unto Him),*[9] and *(Our Lord make us submissive unto Thee, and of our seed a nation submissive unto Thee.)*[10]

Moreover, Prophets and Messengers of the Almighty are described in many chapters of the Qur'an as having surrendered themselves to Him. Says Allah: *(Lo! We did reveal the Torah, wherein is guidance and light, by which the Prophets who surrendered (unto Allah) judged the Jews, and the rabbis and the priests, (judged) by such of Allah's Scripture as they were bidden to observe, and thereunto were they witnesses. So fear not mankind, but fear Me. And barter not My revelations for a little gain. Whoso judgeth not by that which Allah hath revealed: such are disbelievers.)*[11] Speaking of Abraham, Allah says that he *(was not a Jew, nor yet a Christian, but he was an upright man who had surrendered (to Allah) and he was not of the idolaters.)*[12] About Jesus, the Almighty says: *(But when Jesus became conscious of their disbelief he cried: Who will be my helpers in the cause of Allah? The disciples said: We will be Allah's helpers. We believe in Allah, and bear thou witness that we have surrendered* [unto Him].)[13]

The term Islam refers to the religion *(din)* which Prophet Muhammad (Pbuh) has been sent to spread across the world. In His Munificent Book, the Qur'an, the Almighty says: *(This day have I perfected your religion and completed My favor unto you, and have chosen for you as religion: AL-*

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7 Dr. Shalabi, al-Madkhal, p. 27.

8 *Surah Al-Baqarah,* 131.

9 *Surah Az-Zumar,* 54

10 **Surah Al-Baqarah**

11 *Surah Al-Ma'idah,* 44

12 **Surah Al 'Imran, 67**

13

ISLAM.)[14] *(Lo! Religion with Allah is The Surrender to His will and guidance);*[15] *(And whoso seeketh as religion other than The (Surrender) Islam (to Allah), it will not be accepted from* ***him, and*** *he will be a loser in the Hereafter)*[16] **and** *(whomsoever Allah wills to guide, He opens his heart to Islam)*[17]

In this last sense, Islam is synonymous with Shari 'ah in that it incorporates all Prophetic dogmatic, ethical and legal teachings.[18]

The Arabic term ad-din has several meanings. Of these, the most prominent are submission, retribution, reward, punishment, bringing to account, tradition, etc. The verb, *d ana,* means to humiliate and enslave. "The righteous person is one who humbles himself, and works so [to be rewarded] in the Afterlife", says **Prophet Muhammad (Pbuh.)**[19]

Divine legislation is termed as *din* or *millah.* It is *din* (religion) because we follow it in surrendering and humbling ourselves to the Almighty. It is millah (creed) because it is dictated to us[20]. *(yumli* means to dictate.) "Adoration of scholars," says Ali' Ibn Talib, "is a religion ordained".[21]

Ibn Malik says in his commentary on the *Manar* that *Shari 'ah, millah,* and *din* all mean the same thing, all referring to the path that is shown by the Prophet, **Pbuh.** Taken from the point of view of submission, it is *din.* But viewed as a line along which people should conduct themselves, it is *Shari 'ah* or *shar'.* In their different senses, however, the terms indicate a clear road, a fountain of fresh water where flow Allah's ordinances to His servants.[22]

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14 *Surah Al Ma'i dah,* 3.
15 *Surah Al 'Imran,* 19.
16 *Surah Al 'Imran,* 85.
17 *Surah A! An'am,* 125.
18 Dr. Shalabi, a1-Madkhal, p.29.
19 ***Sunan Ibn*** *Majah,* Al Maktaba al 'Ilmiya, Beirut, **Lebanon,** annotated **by Abdul** Baqi, **Muhammad Fu'ad,** 2/1423.
20 *Nazart Fi! Islam* (Insight into *Islam),* **Matba'ah** Al Najah **Publishing House,** Baghdad, 1380H/1960.,p. 12.
21 *Lisan ul 'Arab,* Volume 13, at *din.*
22 **Sharhu Ibn** Malik Lil Manar (excerpted from: **Muhammad** Sallam **Madkour,** ***al-Fiqh al-Islami,*** **Abdullah Wahbah** Library, New **Fagalah** presses, Cairo, **1955,** vol.2, **p.** 12.

We now turn to the s o u r c e s of law-making in Islam, and investigate the philosophies underlying *Shari 'ah.* These include the Munificent Qur'an, the Prophetic *Sunnah; ijma'* (consensus), *a! giyas* (analogy), *istihsan'* (juristic preference) and *masalih mursala* (unrestricted interests), *saddudh-dhara'i* (blocking the means), *'urf* (customary law), the sayings of the Prophet's Companions, and finally *istishab* (presumption of continuity.)

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23 Writers have confused the term evidence with that of sources: see Badran, Abul 'Enien, *al-Shari 'ah al-Islamiyyah, Mu'assasah Shabab al-Jami 'ah,* Alexandria, Egypt, p. 242.

Chapter I

SOURCES OF ISLAMIC *SHARI'AH*

First Source

THE MUNIFICENT QUR'A^ N

The Munificent Qur'an[24] is too well-known to be introduced. However, jurisprudents define it as the Book revealed by Allah Almighty unto His Prophet. It is written in *masdhif* (plural of *mushaf a* receptacle which holds the Qur'an), a book authentically transmitted to us with no doubt.[25] It is a revelation recited; so authored as to be a miracle unmatched in its order.[26]

This Glorious Book is the primary source of Islamic *Shari 'ah.* With it revealed, Allah Almighty has led humanity from darkness into light, brought justice to the weak and saved them from oppressive might; in it, moreover, the rich have been ordered to be charitable to the poor. Upholding it, and guided by its rules, together with the Prophet's *Sunnah,* people who were predominantly unjust before have turned God-fearing and pious. Allah says: *(Ye are the best community that has been raised up for mankind. Ye enjoin right conduct and forbid indecency; and ye believe* in *Allah. And if People of the Scripture had believed it had been better for them. Some of them are believers, but most of them are evil-livers.)*[27]

Such *outstanding* attestation is coming from the All-Knowing and The Sublime; for the benefit of the Islamic nation composed of Arabs and non Arabs. It is because the nation has followed the teachings and the dictates, the rules and the fundamentals incorporated in the Qur'an and *the Sunnah,* that they merit the description of being "the best community that has been raised up for mankind". In the following verses, Allah Almighty tells us about the Qur'an:

(This is the Scripture wherein there is no doubt, a guidance unto those who ward off [evil])[28]

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[24] In Arabic Qur' *an* is a derivative of the source verb *Qara'a* (to read.) While the term applies to the Book as a whole it may also refer to each verse.

[25] Al Ghazali's *Al Talwih Ala'al Tawadieh* Part *I,p.26 dt Al Mustasfa* Part I, p.101

[26] *Al Ihkam fi Usul Al Ahkam* Part I, p. *97; As-Sarakhsi: Usul* As-Sarakhsi,1/279; Ash-Shawkani, *Irshad a! Fuhul, p.29; Usul al Fiqh,* Shaykh Muhammad Abu Zahra, *p.76;* Dr.Abdul Karim Zeidan, *Al Wajiz fi Usul Al Fiqh,* p. 153; Dr. Zakiyyuddin Shaaban, , *Usul Al Fiqh Al Islami, p. 28.*

[27] *Surah Al 'Imran,* 110.

[28] *Surah Al Bagarah, 2.*

([This is] a Scripture which We have revealed unto thee (Muhammad) that thereby thou mayst bring forth mankind from darkness unto light.)

([This is] a Scripture that We have revealed unto thee, full of blessing, that they may ponder its revelations, and that men of understanding may reflect.)[30]

(And they bring thee no similitude but We bring thee the Truth that is elegantly expressed.)[31]

(Will they then not meditate on the Qur 'an, or are there locks on their hearts.[32]

(And in truth We have made the Qur 'an easy to remember, but is there any that remembereth)?[33]

(And ye will come in time to know the truth thereof)[34]

(And We reveal the Scripture unto thee as an exposition of all things, and a guidance and a mercy and good tidings for those who have surrendered (to Allah)[35]

(Lo! This Qur'an guideth unto that which is straightest [al agwam] and giveth tidings unto the believers who do good works that theirs will be a good reward. And that those who believe not in the Hereafter, for them We have prepared a painful doom.)[37]

(Lo! We, truly reveal the Reminder, and Lo! We verily are its Guardian.)[38]

[(Had it been possible for a recital to cause the mountains to move, or the earth to be torn asunder, or the dead to speak, (this Qur 'an would

have done so)].[39]

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29 *Surah Ibrahim ,* 1.

30 *Surah Sad, 29.*

Surah Al Furqan, 33.

31 *Surah Muhammad,* 24.

32 *Surah Al Qamar, 17.*

33 *Surah Sad, 88.*

34 *Surah An-Nahl, 89.*

35 Al Tabari explains that the word *al aqwam* indicates that which is right *al* sawab (as opposed to

36 that which is wrong.)

Surah Al'Isra, 9-10.

37 *Surah Al Hijr, 9.*

38 *Surah Al Ra'd,* 31.

(Allah it is who hath revealed the Scripture with truth, and the Balance. How canst thou know? It may be that the Hour is nigh.)[40]

(Praise be to Allah Who hath revealed the Scripture unto His slave, and hath not placed therein any crookedness.)[41]

(Had it been from other than Allah they would have found therein much incongruity)[42]

Had the Muslim nation followed the directives and avoided the proscriptions enshrined in this Munificent Book, it would not have suffered such afflictions. Nor would it have faced such dissentions which so confuse us that we no longer know what to do, or what medicine to administer; meanwhile the cure may very well be within our reach *(then whoso followeth My guidance he will not go astray nor come to grief But he who turneth from remembrance of Me, his will be a narrow life, and I shall bring him blind to the assembly on the Day of Resurrection.)*[43] How very appropriate is the Prophet's saying narrated by Imam Mi. Ali once heard Prophet Muhammad, may Allah's Peace and Blessings be on them both, tell his listeners about what a sedition is likely to be! Ali asked him about the way out of it. The Prophet (Pbuh) answered: "It is in Allah Almighty's Scripture wherein are related the news of those who came before us and of those who would come after us; wherein judgments may be found for all cases, not trivial but decisive. He, who leaveth it, however mighty, will be broken; and he who seeketh guidance in any other source shall be forced to go astray. It is Allah's unyielding cord, His wise reminder, and His straight path concealed not by whims, confused not by tongues, ever coveted by the scholarly. Its wonders never cease [to surprise us]. When the Jinn listened to it they said: *(Lo! We have heard a marvellous Qur'an, Which guideth unto righteousness, so we believe in* it.)Whosoever citeth it will be right, whosoever abided' by its rulings will be rewarded, whosoever judgeth by it is fair, and whosoever preacheth it doth guide to the straight path".[44]

Yes, indeed! It is the savior Book, the panacea and the cure; it is mercy God-sent. Within it are embodied the constitution and the law of the Islamic nation. Allah Almighty says: *(And We reveal of the Qur'an that which is a*

+3 *Surah As-Shura,* 17.

41 *Surah Al Kahl,,* 1.

42 *Surah An-Nisa, 82.*

43 *Surah* Tab Ha, 23-124.

44 Related by Al Tirmidhi : *Tuhfat al Ahwadhi bi-Sharh Jami ' al-Tirmidhi,* vol. 8, p. 218.

healing and a mercy for believers though it increases the evil-doers in naught save *ruin);* [45] *(0 mankind! There hath come unto you an exhortation from your Lord, a balm for that which, is in the breasts, a guidance and a mercy for believers.)*[46]

Of those who abandon the Qur'an for another constitution and law-enshrining doctrine, `Allamah Ibn ul Qayyim states: "How much have the abandoners been deprived of the verses revealed? What troves of knowledge have they been denied, what life for the heart and what light for the vision? They are content with statements they extricate with the axes of thought, statements upon which they differ; content to condescend to inspire one another with mere embellishments, content, for this, to abandon the Qur'an! Although they know the Qur'an by heart, they do not understand it, its institutions are rendered unpopulated, its banners, fallen; its shining stars no longer beam within them, its radiating sun, turned dark by their unjust thoughts, is no longer seen" [47]

First and Last Verses Revealed

The first verse to be revealed of the Qur'an is most probably *(Read in the name of thy Lord who createth, createth man from a clot. Read: And thy Lord is the Most Bounteous, Who teacheth by the pen, teacheth man that which he knew not.*)[48] According to 'Aisha,' the Messenger of God had first had apparitions which would come as clear as morning light. Later, he became more inclined to spending time alone at the cave of Hiraa', where he would stay nights on end and then return to his wife Khadijah to furnish him with the supplies he needed for yet other nights alone in the cave. At one such night, Gabriel came to him and told him to read. The Messenger of God, being illiterate, said he could not. Gabriel " then held him close to his chest until he (Pbuh) felt terribly exhausted, whereupon, Gabriel released him. This the Archangel repeated three times after which he recited: *(Read in the name of the Lord who createth)* to the end of the *surah.* The Prophet, then, returned with the verses live in his mind, and with shudders running all through his body. 'Aisha

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45 *Surah Al-Isra, 82.*

46 *Surah Yunus, 57.*

47 *Madarej Al Salikin* vol. I, *p.S.*

48 *Surah Al 'Alaq,* 1.

tells us, then, that this was the first verse revealed.[49] (Narrated from Aisha, by Al Hakim in the Mustadrak and Al Bayhaq'i in Al Dala'il.)

A great many stories, though all speculative, are told about the last verse. Some have it that it is:... (0 *ye who believe, observe your duty to Allah, and give up what remaineth (due to you) from usury.)*[50] *Others say it is this:*

(O Ye who believe! When ye contract a debt for a fixed term, record it in writing....) [51] *It is also said it is ... (Guard yourself against a day in which ye will be brought back to Allah.)*[52] Several other speculations are also reported.[53]

In order to verify meanings and implications of the Qur'an and its various *surahs,* the scholars are interested in studying the context under which they are reported to have been revealed. Many valuable books have been written in this respect, but space does not permit here to list them.[54] Most scholars, however, rely on the generality of the words of the text rather than on the particularity of the context and occasion of the revelation. Others, though a minority, maintain the opposite view and attach greater significance to the cause and occasion of the revelation of a text rather than the generality of its *wording* in matters of interpretation. We believe the first view is preferable.

The Miraculousness of the Qur'an

The Qur'an has been revealed in Arabic, the language of a nation of orators and elocutors. The Almighty, wishing to challenge Arabs at their own skills, thus produced the undying miracle of our Prophet (Pbuh), the Munificent Qur'an. Al Bukhari tells us that the Messenger of God (Pbuh), said: All of Allah's Prophets are granted that which compels belief, his (miracle) has been a revelation from Him, "Would that mine be the greatest following," he said.[55]

In His Book, the Almighty even challenges the Arabs to produce anything the like of it; Says He: "... *(though mankind and the Jinn should*

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49 Shaykh Al Soyouti, Jalal Eddin Abdul Rahman, *A! Itqan fi 'Ulum Al Qur'an on the margins of I jaz a! Qur 'an* by Judge Abu Bakr Al Bagillani, vol. I, p. *23,* Alam Al Kuttub; Beirut

50 *Surah Al Baqarah, 278.*

51 *Surah Al Bagarah, 282.*

52 *Surah Al Bagarah,* 281.

53 See, *Al Borhan 1/210 & Al-Itqan, p.1/27* & Dr. Al Saleh, Sobhi's *Mabaheth fr Ulum Al Qur'an; Dar Al '!m Lil Malayan,* Second Edition, Beirut, 1385, *p.* 313.

54 See, for example, Ali Ibn Al Madini, *Asbab Al Nuzul.*

55 *Fath Al Bari, Sharh Sahih Al Bokhari;* Dar Er-Rayan Lil Turath, Cairo, *8/618.*

assemble to produce anything the like of this Qur'an, they could not, even if they helped one another".)[56]

Knowing they could not, he challenges them to produce as many as only ten *surahs: (Or they say: He hath invented it. Say: Then bring ten surahs, the like thereof invented, and call on everyone ye can other than, Allah if ye are truthful/ And if they answer not your call, then* know *that it is revealed only in the knowledge of Allah ....)*[57]

And then again to come up with only one *surah:* (Or say they: He hath invented it? Then bring *a surah* like unto it if ye are truthful)[58]"

(And if you are in doubt concerning that which We reveal unto our Servant (Muhammad), then produce a surah of the like thereof and call your witnesses beside Allah if ye are truthful)".[59]

Thus mankind and Jinn have been unable to bring about anything similar to the Glorious Qur'an for the last fifteen centuries. They have been even unable to bring about only ten chapters *(surahs),* not even one *surah* of comparable glory. So, all sensible people must come to realize that the Qur'an is The Word of Allah, not the utterances of mortals. Whatever is in the Qur'an is truth beyond which there is nothing other than falsehood.

Aspects of Qur'anic Miraculousness

The Qur'an is inimitable in every sense of the word. Scholars have differed amongst themselves on the actual meaning of *al-i'jaz*.

Some have it that it so stands because it tells us of things that only God Almighty knows, things that took place in the past.

Others believe it is the incomparable eloquence, the sound and the structure which make the Qur'an inimitable. Others believe the miracle lies in the various disciplines and sciences it incorporates. There is nothing, however, to rule out that it is all of this combined.

Al Khattabi has put it aptly in his book, Bayan I'jaz Al Qur'an, when he says that: 'The Qur'an is incomparable in the eloquence of the word, and in both structure and organization. The Munificent Book conveys most accurately its meanings in expounding the attributes of Allah and calling for the worship

56 *Surah Al Isra, 88.*
57 *Surah Hud, 13 -14.*
58 *Surah Yunus, 38.*
59 *Surah Al Baqarah, 23.*

of none other than Him, and in urging Man to obey Him. It tells us what acts are permitted and what are not; what is banned and what is allowed. It attempts to set us on the right path by commanding us to follow what is good and to reject what is bad; to pursue what is ethical and to abandon what is not. It so puts everything in its proper place that anything else would be inappropriate; indeed that no one, in their best imagination, could envision anything better. The Book relates to us the events of the centuries past, and describes the punishments the Almighty administered to the defiant and to the disobedient. It predicts future incidents offering both the evidence and the argument, both the cause and the effect, "that it confirmeth what it preacheth, and that it showeth what is prescribed and what is proscribed".

To produce anything that is a synthesis of so many opposites and yet so organized and so well-structured is beyond the capacity of mankind. Hence man's failure to bring forth anything close to the Qur'an, let alone like it.[60]

I would like, at this point, to refute the claims of an imposter- who lived in Arizona, USA, but who is now dead- that he discovered a new aspect to demonstrate what a miracle the Qur'an is. The discovery is the number 19, which he said is mentioned 19 times in the Book. He also claimed to have counted to 19 the letters in the ***basmalah:*** the phrase ***"bism 'illahh al rahman al rahim"*** (in the Name of Allah the Merciful and the Compassionate.) To him, the Prophetic ***Sunnah*** was nothing, and all Prophetic sayings were fabricated. And to top it all, he claimed that he himself was God's messenger.

If anything, these are all false claims. The letters in the ***basmalah*** are certainly not 19, and it is surely not a miracle indicator that certain numbers are repeated in the Qur'an. As far as the Prophetic ***Sunnah*** is concerned, Muslim scholars have worked to protect and preserve it over time. Disbelievers in the ***Sunnah*** are, moreover, considered apostates. Finally, Muhammad (Pbuh) is known to be the seal of God's Prophets and Messengers. Whoever thinks otherwise is again an apostate who should be asked to repent or be killed.

The imposter has been found dead at home, stabbed 19 times. Allah averted the evil of this imposter from the Muslims.

This was the first source of Islamic legislation.

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[60] Dr. Al **Sobhi Saleh,,** ***Mabahith*** *fi 'Ulum Al Qur'an, p.313. 23*

Second Source

The Prophetic *Sunnah*

In Arabic, *Sunnah* indicates the way and the habit. In matters of worship, however, it refers to all acts which the Prophet (Pbuh) performed over and above those enjoined by the Almighty referred to as *hadith.* In the present context, *Sunnah* denotes all Prophetic. *hadith* (sayings) and acts including implicitly approved acts *[tagrir],* that is, acts to which he did not object or which he approved during his lifetime.[61]

Al Shawkani explains that the term *Sunnah* literally means the trodden path. One would say *sannant:* to sharpen: to have something (say a knife) pass over an instrument until it is affected. Another derivative is *sanna:* to chart out a path. Al Kisa'i, on the other hand, takes the term to mean sustainability of water, one would say *sannantu,* if one continues to pour it. To Al Khattabi, it implies the exemplary conduct if said in the absolute. However, it may be used restrictively to mean the exact oppositein in saying, for instance, that so and so laid down a bad *Sunnah.* The term is also said to indicate the usual way, whether good or bad. Prophet Muhammad (Pbuh) promises him "who establishes a good *Sunnah* to be rewarded for it as well as for those who follow it until the Day of Judgment"; he also warns him "who establishes a bad *Sunnah* that he will be brought to account for it and for those who follow it until the Day of Judgment".[62]

As far as *Shari 'ah* is concerned, *Sunnah* refers to all Prophetic *hadith,* acts whether intentionally indicated or whether let pass as approved. To linguists, it implies all duties, whether or not enjoined. To *fiqh* scholars, it denotes only. those acts, which are not God-enjoined. It compares to *bida'ah:* heresy, heterodoxy, and unorthodoxy.

To attribute *Sunnah* to Abu Bala, `Umar Ibnul Khattab or anyone of the Truthful Caliphs is reported in Linguistics work by Ibn Faris to be disliked. However, this is refuted by the *hadith:* "Thou havest my *Sunnah*, and that of the orthodox caliphs; so clingeth thou unto it with all your might". By *Sunnah* here the Prophet (Pbuh) denotes the way, or the path. *Sunnah* may also indicate an act, the opposite of which is not proscribed. The term also applies to all acts, which Prophet Muhammad (Pbuh) was keen on pursuing but which he

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61 Taftazani, *Al Talwih Ala/ Twadiih,* vol. *2,* p.2; *Al-Ghazali, Mustasfa, vol.* 1, *p.129.*

62 *Sahih Muslim bi sharh Al Nawawi;* Dar Ihyya' al Turath Al Arabi, Beirut, Lebanon, 1404/1984, *p. 2,* 7/104.

neglected occasionally without giving any excuses. In acts of worship they are said to be al ***nawafil*** (supererogatory.) In terms of evidence, they refer to the bulk of Prophetic ***hadith*** [qawl], and acts whether intentionally indicated ***[fi*** 'el] or whether tacitly approved ***[taqrir].***[63]

By ***hadith,*** we mean all that which the Prophet (Pbuh) said on different. occasions. To cite a few examples, we refer to the following ***hadith:*** "Deeds are judged by intentions, to each, thus, what he intendeth...;"[64] "the parties to a sale have the option to revoke it before they leave each other";[65] "whoso bringeth to us that which does not belong to us is to be rejected;"[66] "whosoever sees an evil should change it by his hand, if he faileth, then by his tongue, and if he faileth then (let him denounce it) in his heart, which is the weakest degree of faith;"[67] "followeth thou the ***Sunnah*** of your predecessors, span by span, inch by inch... "[68]

By Prophetic acts, we refer to all ***Shari*** 'ah-relevant judgments such as ordering the cutting of a thief s hand down from the wrist and to all rituals of worship such as ablution, prayers, fasting, and Hajj and adjudication based on one witness with the claimant's oath...and to cut off the right hand of the thief from the wrist.

Some of these are intended for ***Shari 'ah*** purposes while others are not.[69]

Tacit approval ***[taqrir]*** indicates all what the Prophet (Pbuh) saw of his companion's acts to which he did not object. In this case silence indicates approval on the Prophet's side. Such acts are considered legal. Entrusted as they were with relaying the message, the Prophets and Messengers could not perceive a wrong and be silent about it. An example of this is the story that upon passing by a woman crying at the side of a grave, the Prophet (Pbuh) told her to keep faith in God and to be patient. The woman asked him to leave her alone since he did not know how great her suffering was. When, later, she was

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63 AlShawkani, *Irshad al Fuhul ila Tahqiq al Haq min 'Ilm al Usul,* p.33.

64 Narrated by Al Bukhari & Muslim as related by 'Umar (May Allah be satisfied with him.) Narrated

65 by Al Bukhari & Muslim as related by Ibn 'Umar (May Allah be satisfied with them.)

66 Narrated by Al Bukhari & Muslim.

67 Narrated by Muslim.

68 Narrated by Al Bukhari & Muslim.

69 *Sharh Musallam al thubut,* p. 2/181 *& Al Amidi, al-Ihkam, p.* 1/247-248 *&* Al Shawkani *Irshad pp.35-36;* Abdul Karim *Zeidan, Al Wajiz fi Usul Al Fiqh; Mu 'assasah Ar-Risalat, Beirut, p.6,* p.156

told that she had been addressing the Prophet himself (Pbuh), she went to see him at his house. "I did not know who you were," she told him. The Prophet advised her to be patient at the first shock.

He (Pbuh) did not disallow the act. His silence, thus, makes it permissible for women to visit the graves.[70] Other instances include approving prayers by the companions, who for lack of water, used sand in ablution, only to find water later, and also sanctioning zebra meat as human food.[71]

Sunnah, in all its parts *[gawl, fi 'el* and *taqrir], is* the second source of Islamic law. In many verses of the Qur'an, the Almighty commands us Muslims to follow the teachings of the Prophet (Pbuh):

1. *(And obey Allah and the Messenger, that ye may find mercy);*[72] is as true an evidence as any, that obeying both Allah and the Prophet (Pbuh) is a duty enjoined. This applies as much to obeying the Prophet (Pbuh) during his lifetime as after his death.
2. *(O ye who believe, respond to Allah and the Messenger when he calleth you to that which enlivens you, and know that Allah cometh in between the man and his own heart and that He it is unto Whom ye will be mustered)*"
3. *(Whoso obeyeth the Messenger obeyeth Allah, and whoso turneth away, We have not sent you as a warder over them.)*[74] In this verse, obedience to the Prophet stands on equal footing as obedience to God. Of Prophet Muhammad (Pbuh), Allah says: *(And lo! Thou art of a tremendous character.)*[75]
4. *(Say (0 Muhammad to mankind), if ye love Allah, follow me: Allah will love you and forgive you of your sins. Allah is All-Forgiving, All-Merciful.)*[76] Loving Allah, which is as a duty enjoined in Islam depends on following His Messenger.)[77]

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70 Zakiyyiddin Sha'aban, Zaldyyiddin, *Usul Al Fiqh Al Islami;* Nafii *press, Cairo,* p.51.

71 Shaykh Muhammad Abu Zahra, *Usul Al Fiqh;* Dar Al Fikr Al Arabi, Cairo 1377/1958, 105.

72 *Sarah Al 'Imran,* 132.

73 *Sarah Al Anfal,* 24.

74 *Sarah An-NisQ , 80.*

75 *Sarah Al Qalam , 4.*

76 *Sarah Al 'Imran,* 31.

77 Al Amadi, *Al Ihkam fi Usul Al Ahkam, 1/176.*

5. *(And let those who conspire to evade orders beware lest grief or painful punishment befall them.)*[78] The verse incorporates a severe warning against disobeying the Prophet (Pbuh) and a threat that a severe punishment will afflict those who disobey him.

6. *(Say obey Allah and the Messenger. But if they turn away, Lo! Allah loveth not the disbelievers.)*[79] From this, we infer that disobeying the Prophet (Pbuh) is tantamount to disbelief.

7. *(And it becometh not a believing man or a believing woman, when Allah and His Messenger have decided an affair that they should claim any say in their affair; and whoso is rebellious to Allah and His Messenger, he verily goeth astray in error manifest.)*[80] Here, obedience to Allah and to His Prophet (Pbuh) is deemed a duty whose neglect is equated to straying away from the right path.

8. To be averse to the rulings of both Allah and the Prophet (Pbuh) is deemed by the Qur'an, a sign of hypocracy. This could be evidenced in the following verses: *(And they say: We believe in Allah and the Messenger and we obey: then after that a faction of them turn away, such are not believers. And when they are called unto Allah and His Messenger to judge between them, lo! A faction of them are averse ".* [81] *And "The saying [of all true] believers when they are called unto Allah and His Messenger to judge between them is only that they say: We hear and we obey. And such are the successful. He who obeyeth Allah and His Messenger and feareth Allah and keepeth duty [unto Him] such indeed are the victorious.)* [82] In the last two verses, the Almighty made clear that obedience and submission are characteristics of the believers. Those who have them are winners in this as well as in the afterlife.

9. Another sign of believing is for believers never to leave the Prophet (Pbuh), wherever he may be, without first asking permission. *(They only are the true believers who believe in Allah and His Messenger,*

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78 *Sarah An-Nur,* 63.
79 *Sarah Al 'Imran,* 32.
80 *Sarah Al Ahzab,* 36.
81 *Sarah An-Nur,* 47-48.
82 Sarah *An-Nur, 51-52.*

and, when they are with him on some common errand, go not away until they have asked leave of him)"

10. Allah Almighty further commands us to obey whatever has been conveyed by the Prophet (Pbuh.) On this, He says: *(And whatsoever the Messenger giveth you, take it. And whatsoever he forbiddeth, abstain [from it].*[84] Although revealed in the context of distributing the spoils of the battle of Uhud, the verse applies to everything where Prophetic teachings and proscriptions exist.[85] (All rulings elaborated on in the Prophet's Sunnah, though not explained in detail in the Qur'an, come under this category. The Qur'an has thus proclaimed the Sunnah as a fundamental source of legislation)[86]

In His Book, Allah Almighty entrusts the Prophet (Pbuh) with the duty of elucidating that which is not detailed in the Qur'an: *(And We revealed unto thee the Remembrance that thou mayest explain to mankind that which hath been revealed for them)* [87] "And : *(We have revealed the Scripture unto thee only that thou mayest explain unto them that wherein they differ, and as a guidance and a mercy for a people who believe.)*[88]

Moreover, the Prophet's followers are ordered to follow him and accept his judgments. The Almighty commands them further never to contradict it for fear of being disbelievers: *(But nay, by the Lord, they will not believe [in truth] until they make thee judge of what is in dispute between them, and find within themselves no dislike of that which thou decidest, and submit with full submission)*[89]

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83 *Sarah An-Nur, 62.*

84 *Sarah Al Hashr,.7.*

85 In Al-Qurtubi'sbook *Al Jam'i Li Ahkam Al Quran, Mu 'assasah* Manahel *Al* 'Irfan, Beirut, 1385H/1990, Part 9, vol. 18, p. 17. Al Mahdawi is reported to have confirmed on the same page that despite it being revealed in the context of war-spoils, the verse applies to all Prophetic commands and proscriptions. In this connection, a Prophetic Hadith is cited, which was relayed by Al Hakam Ibn Omair, one of the Prophet's companions. In it, both the Qur 'an and the Hadith are described as difficult. However it promises redemption [from Hell] to them who abide by and preserve the hadith. Those who are neglectful of the Qur'an and the Hadith are moreover warned of losing in this and in the afterlife.

86 Dr. Zakiyuddin Sha'ban, *Usul Al Figh Al Islami,* p. 76.

87 *Surah An-Nahl,* 44.

88 *Sarah An-Nahl, 64.*

89 *Sarah An-Nisa, 65.*

The high standing of Prophetic *Sunnah* is made all the clearer in the following verse: (Allah verily has shown grace to the believers by sending unto them a Messenger of their own who reciteth unto them His revelations and causeth them to be purified and teacheth them the Scripture and Wisdom, although before (before he came to them), they were in flagrant error.)[90]

Ash-Shafei, the great Muslim Imam, tells us that wisdom, here, indicates the *Sunnah.* Given the fact that believing in the Prophet (Pbuh) is part of believing in Allah Almighty, it would be inappropriate to refer to anything as ordained unless it is the Qur'an or the *Sunnah.*[91]

According to Ash-Shafei, then, wisdom refers to something other than the Qur'an, which stands also as the opinion of most Muslim scholars.

Dr. Mostafa Al Seba'i confirms Ash-Shafei's views in this connection. The term, he affirms, indicates the *Sunnah,* because of the use of the additive conjunction which denotes dissimilarity. It cannot be anything but the *Sunnah* since Allah Almighty speaks of showing us grace by teaching us the Scripture and Wisdom. Since grace from Allah cannot be but what is right and proper, we are just as bound to follow *Sunnah* (wisdom) as we are to follow the teachings of the Qur'an. The fact that Allah Almighty commands us to observe only that which the Qur'an and the Prophet (Pbuh) enjoin is proof that the term wisdom does refer to *Sunnah* in matters of law-making.[92]

It is clear that all Qur'anic verses above-mentioned constitute strong evidence to *Sunnah* being a fundamental source of *Shari 'ah.*

The companions of the Prophet (Pbuh) are all in agreement that judgments derived from the *Sunnah* are mandatory in cases where no judgments could be extricated from the Qur'an. The Prophet (Pbuh) is reported to have questioned Mu'adh Ibn Jabal, who was about to be installed in Yemen, over how he would make his judgments. Ibn Jabal said he would judge according to the Qur'an. "What if thou findest not [your judgment] therein," asked the Prophet (Pbuh.) "Then according to the *Sunnah,"* he answered. If he finds it neither here nor

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90 *Surah Al 'Imran,* 164.

91 Al-Shafi'I, *Ar-Risalah,* p. *78;* see also *Mostafa* AI Sebai, *Al Sunnah wa makanatoha Fi Al Tashri 'e Al Islami,* ed.; Al Maktab Al *Islami;* Damascus & Beirut, 1402H/ 1982 , *p.50.*

92 Mosrafa Al Sebai, *Al Sunnah wa Makanatoha Fi Al Tashri 'e Al 1slami,p.51.*

there, Ibn Jabal adds, he would follow his own judgment.[93] The Prophet (Pbuh) **was** pleased and praised Mu'adh ibn Jabal.

In addition to the consensus of opinion *(ijma)* this view is supported by sound reasoning. For it is inconceivable that Allah Almighty would send a Messenger to a people, without his words benefiting them, and without granting him the power of establishing, explaining and elucidating the rules.

Prophetic *Sunnah* has basically three main functions:

- To elaborate on matters such as prayers and alms-giving ("Establish worship, pay the poor dues"), Hajj and umra, selling and **usury** which, though mentioned in the Qur'an, are not expounded in every detail.
- To confirm and underline matters mentioned in the Qur'an such as the *hadith "* Be charitable into women for they are in your custody, and are entrusted to you by Allah". This *hadith* affirms the Words of Allah Almighty: (treat them with kindness....)
- To introduce new rules which have not been brought forth by the Qur'an. Examples: the prohibition through fosterage of the same women for marriage who has been proscribed by blood tie; to avoid severing the ties of kinship, a man should not take for a second wife (while his wife is alive), her aunt (whether on the maternal or the paternal side), her niece or her sister; giving 1/6 of a man's inheritance to his grandmother and a similar amount to his son's daughter; *sadagat Al Fitr* (alms-giving enjoined on the occasion of breaking the fast of Ramadan); relatives of the killer are compelled by a Prophetic ruling to pay diyah (blood money given in compensation to a victim's family); a killer shall not inherit; and prohibition of inheritance between Muslims and disbelievers.

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93 *Usul As-Sarakhsy* 2/106-107, narrated by Imam Ahmad, Abu Dawud, At-Tirmizzi, Ibn Adiyy and At-Tabari, and Al Biayhaqi, from Al Hareth from 'Umar and Nasb Ashab from Mu'adh Ibn Jabal. Although this *Hadith* is doubted, its transmitters being unknown, the *umma* (Muslim community) has approved it (see Ibn ul Qayyim's *A'alam Al Mowaquein,* 1/243; Ibn Hajar Asqalani, 2/182; Shaykh Eissa Manoun's *Nibras Al 'Uqul,* p. *81;* Al Khattib Al Baghdadi's *Al Faqih Wal Motafaqih,* 1/881; Dr. Ali Hassan Abdul Qader's, *Nazhra 'Ama Fi Tariekh Al Fiqh Al Islami,* p. *57.*

These rules, along with many others, are evidence to the effect that *Sunnah* is an independent source of *Shari 'ah*.[94]

Corroborating this argument, Ash-Shafei also says: All scholars are agreed that the *Sunnah* of the Prophet has three aspects: one is what was revealed by Allah Almighty in His Book, and the *Sunnah* of His Messenger is the same as what was revealed. The second is what Allah Almighty revealed in general terms, and whose meanings were elaborated or qualified by the Prophet. The third is the *Sunnah* laid down by the Prophet in the absence of a clear text regarding a matter in the Munificent Qur'an.[95]

In respect of transmission, *Sunnah* is divided into:

- *Mutawatir Sunnah,* with a successive chain of narrators
- The *Mashhur,* or Well-known *Sunnah ;* and
- The *Ahd* or Unilaterally transmitted *Sunnah* .

Documentation *of Sunnah*

During his lifetime, the Prophet (Pbuh) ordered his companions not to write down *Sunnah* lest it should be confused with the Qur'an. Afterwards, he allowed them to write it down.

Moreover, Abu Bakr never commanded. any of his Companions to write it down, although the . idea was introduced and debated during `Umar Ibnul Khattab's time, it was finally abandoned with the companions being separated in different parts of the land and with fear sustaining that it might still be confused with the Qur'an.

Even during the Umayyad's reign the *Sunnah* was not written down. It was not until the Abbasids came to power that any real attempt was made at compiling the *Sunnah.* Malik's Al Muwatta'a is known to have initiated the process, followed later, in the third century of the Hijra calendar, by Al Bukhari (died in 256H), Muslim (died 261H), Abu Dawoud and Ibn Maja (died 275 H), Al-Tirmizzi (died 279H), and al-Nasa'i (died 303H.) These books which were authored by those great memorizers, are known as: Al Sihah al Sittah or "The Authentic Six".

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94 Dr. Muhammad Mostafa Shalabi, *Al Madkhal Fi Al Figh Al Islami,* p. *283.*
95 Al-Shafi'i, *Ar-Risalah;* annotated by Ahmad Muhammad Shaykh Shaker, *p.92.*

There was also Musnad of Al Imam Ahmad b. Hanbal (died 241H.)[96]

All of those great Imams are known to have outdone themselves attempting to discriminate between good *hadith* on the one side, and forged **and** weak *hadith* on the other; committing to writing only that which complied with their terms and conditions.

The scholars of *Sunnah* have accepted the narration of the *hadiths* by those Imams after subjecting them to the closest scrutiny, and after having found them impeccable. However, as in all ages, there have been people who believe that unless the *Sunnah* complies with the Qur'an, it is not acceptable. They base their argument on *a hadith,* suspected by most scholars to be forged, where the Prophet (Pbuh) urged that whatever is taken to be of him should be compared to the Qur'an. If it contradicts the Book, then it should not be assumed as his. The *hadith* is presumed by Abdul Rahman Al Mahdi to have been fabricated by the infidels and the khawarij (people who turned against the Caliph Ali ibn Abi-Talib.) Others believe that this very *hadith* contradicts the Book which commands us to obey the Prophet (Pbuh), and to follow his acts 9[7]

This reminds us of the imposter who lived in the US and who dismissed the whole bulk of Prophetic *hadith.*

Sunnah has played an important role in establishing Islam as a religion as in the making of Muslim history and of civilization. The Prophetic approach towards introducing the first model of international civilization, devising its frames of reference and rules, its boundaries and methodology as well as setting its direction and intention are all based on the "Fundamentals of the Superior Revelation".98

Without the Qur'an, and the *Sunnah* as its code of action, the Muslim nation would be lost. Says the Prophet (Pbuh): "I have left among you that which if thou holds unto, wilt never let you go astray**,** the Qur'an and *Sunnah".*[99]

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96 Muhammad Mustafa Shalabi, *Al Madkhal Fi Al Fiqh Al Islami, p.* 287.

97 Muhammad Mostafa Shalabi, *Al Madkhar,* p.289.

98 Barghouth Abul Aziz Bin Mubarak, *AI Manhaj Al Nabawi wal Taghier Al Hadari,* Kittab Al Umma, p. 118.

99 *Sharh Al Zurqani Ala Muwatta' Al Imam Malik, Beirut,* Dar Al Ma'refa,4/246. 33

Third Source

Ijma' (Consensus)

In Arabic the term *ijma'* has two meanings:

- Determination and resolve. *Ajma 'a: v.* to become determined. Says Allah in His Munificent Qur'an: *(then agree together.)* In that same context, the Prophet says: "He wilt not be fasting [the next morning] who does not resolve to do so by night". *ijma'* can also mean one person's intent or resolution.

- Agreement or consensus: Of a people, *ajma ' u* refers to their being of the same opinion whether in secular or religious matters.[100]

As far as legal theorists are concerned, *ijma'* occurs when scholars of the Muslim nation following the Prophet's death, are in agreement about a case of *Shari 'ah,*[101] *a* term which refers here to whatever is included in a law-maker's pronouncements.

Proof of *Ijma'*

Says Allah in the Qur'an: *(And whoso opposeth the Messenger after the guidance (of Allah) hath become evident unto him, and followeth other than the believer's way, We appoint for him that unto which he himself hath turned and expose him unto hell - a hapless destiny.)* [102] "Thus, whosoever follows a path other than that of the believers deserves to be punished in Hell. That also means that the believers' path must be the correct one.[103]

- The Prophet's *hadith:* "Never will my nation agree on an error;" and "Allah's Hand goeth with the *jamaa* (the Muslim nation); whoso dissents, *his* refuge is in Hell;" and "Never will Allah gather my nation on an errancy"[104]; and "Whatsoever is deemed by Muslims as

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100 Al Amidi, al-Ihkam, 1/195; and AI Shawkani, Irshad, p. 71.

101 *Sharh Musallam Al Thubout; Al Talwih Ala! Tawdih;* Muhammad Zaki Abdul Bar, *Taqnin Usul Al Figh;* 1" ed.; Maktabah Dar *ul Hadith.*

102 *Surah An-Nisa,* 115.

103 *Sharh Musallam Al Thubut;* Al Amidi, Ihkam, vol. I, p. 200.

104 Ibn Ham, Volumes 1 & 4/131.

good is so-deemed also by Allah;" "I pleaded to Allah never to let my nation gather on an errancy, and this I was granted".

All above mentioned *hadiths* have been accepted by the Prophet's companions. as they have been by scholars and followers of Islam later on.

On the other hand, there were those such Al Nazzam,[105] Al Khawarij and the Shiites who thought differently. They believed *ijma'* is not a proof and based their argument on the following:

- Allah's saying: (0 *ye who believe! Obey Allah and obey the messenger and those of you who are in authority; and if ye have a dispute concerning any matter, refer it to Allah and the messenger, if ye are [in truth] believers in Allah and the Last Day. That is better and more seemly in the end.)*[106]

- The *hadith:* When Mu'adh Ibn Jabal, who was about to be installed in Yemen, was questioned by the Prophet (Pbuh) over how he would make his judgments. Ibn Jabal said he would judge according to the Qur'an. "What if thou findest not [your judgment] therein?" asked the Prophet. "Then according to the *Sunnah,"* he answered. If he finds neither here nor there, Ibn Jabal adds, he would follow his own judgment.

The argument is that Ibn Jabal never mentioned *ijma'* as a basis of judgment.

' The arguments used here, are obviously weak. The verse does by no means rule out *ijma'.* What it does, however, is enjoin obedience to Allah and the Prophet. It refers judgment over disputes to the Almighty, His Messenger and those in charge. *ijma'* does refer to the Book and to *Sunnah* in making judgments, which renders the first argument invalid. As to the *hadith,* Ibn Jabal could not mention *ijma',* because it simply was unthinkable during the Prophet's lifetime.

Ijma' is accordingly proclaimed as one of the sources of *Shari 'ah.* An example of *ijma'* is the convergence of the Prophet's companions and of Muslim scholars that a grandmother, if an only grandmother, would inherit 1/6

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105 He is Ibrahim Ibn Sayyar Al Basri (died in 231 hijra); *a Mu 'tazila* scholar, he gave his name to this group. *Al Nazzamiyyah* was the first to reject *Ijma '* and *Qiyas.* He was openly licentious, and a drunk.

106 *Surah An-Nisa, 59.*

of a grandson's wealth; and if there are more than one grandmother they would all share the same percentage.[107]

Ijma' has also decided against a man's marrying his wife's aunt, niece or sister, and construes a step-brother and a step-sister on the father's side as blood brothers and sisters, in the absence of brothers and sisters.

According to *Ijma',* a Muslim woman does not marry a non-Muslim, if she does the marriage is deemed null and void.[108] Muslim consensus over choosing Abu Bakr as Caliph after the Prophet's death, over fighting the refiners of *zakat* and over compiling the Munificent Qur'an in the *mushaf are* all instances of *Ijma'*. Another such instance is forbidding the distribution of open lands to Muslim conquerors as spoils of war, and endowing them as *"Waqf'* in favor of Muslims, from the proceeds of which judges, workers and soldiers could be paid, and widows and orphans provided for. After the conquest of Syria (Ash-Sham) and Iraq during the Caliphate of 'Umar Ibn il IChattab, some companions were against this ruling such as Abdul Rahman Ibne Awe and `Ammar Ibn Yaser. Meanwhile, 'Umar Ibn il Khattab, `Ali Ibn Abu Talib and 'Uthman Ibn `Affàn were, all in favor. Opposers objected that `Umar was giving *ordinary* Muslims that which the conquerors earned by the work of their sword.

'Umar hypothesized over the situation where future generations of Muslims would be in to find the land divided and inherited. 'Umar pursued his argument until his views were approved by the majority. An *Ijma'* was thus **established.**[109]

Types of *Ijma'*

There exist two types of *Ijma':*

1. Evident *Ijma'*

This is where scholars render their opinions openly until a consensus is reached, or else that scholars could be asked each to separately give their opinions on a case. Or a scholar may give an opinion which would be communicated to the others who would approve of it orally, or in terms of judgment, or juridically.

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107 *Zakiyyudin* Sha'ban**,** *Usul a!-Figh,* p. *90.*
108 Abu Zahra., *Usul al-Figh,* p. *201.*
109 Zakiyyuddin Sha'ban, *p.95.*

This type of *ijma'* constitutes a binding evidence which may neither be contradicted nor refuted.[110]

2. Silent *ijma'*

Here, a scholar renders an opinion which is communicated to other scholars who neither openly support it nor openly oppose it, provided they are free from fear of persecution or other such fears. Here also, scholars should be allowed ample time to understand the issue under judgment, but he keeps silent

An instance of silent *ijma'* is the case when `Uthman Ibn Affan sold a property he had in Basra to Talaha Ibn Ubaydullah. Neither of them had seen the property. But each was told he was treated unjustly. `Uthman answered that he still had the option since he sold what he had not seen before. On the other hand, Talaha also said he had the option since he bought what he had not seen. The two then put the case to Jubair Ibn Mut'am, who ruled that only Talaha, the buyer, had the option. The judgment was rendered in the presence of the Prophet's companions who made no objections. Hence the judgment that only the buyer not the seller could choose whether or not to purchase a property he has not seen.[111]

This type of *ijma'* has been opposed by Maliki scholars and Imam Ash-Shafi' in his new Judgments among others. Their argument is that silence could as much indicate approval as not. A man could be silent if he did not examine the issue at hand, if he was awed or intimidated, or if he feared persecution. There exist a great number of possibilities which make it impossible for us to speculate whether or not silence is intended as agreement over judgments passed. And without agreement by all there could be no consensus, no argument.[112]

Most Hanafi scholars and Ibn Hanbal, on the other hand, deem judgments of silent *ijma'* just as binding as those of evident *ijma'*. Their argument is that not openly objecting to a judgment is evidence of *ijma'*. Once *ijma' is* established, the judgment becomes binding."[113]

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[110] Zaidan, *Al Wajiz Fi Usul al Fiqh,* p. *183.*
[111] Zakiyyuddin Sha'ban, *Usul al-Fiqh,* p. 81.
[112] Zakiyyuddin Sha'ban, *Usul,* p. *86.* Abu
[113] Zahra, *Usul al-Fiqh, p. 207.*

Fourth Source

Al *Qiyas (Analogy)*

Al Qiyas (analogy or equivalence) in the Arabic language means to assess the value of something according to the value of its equivalent. A case in point is when it is said that the garment is measured *(qas a)* by the amount of meters, in the sense that the value of the whole is the sum of its parts. *Al Qiyas* also denotes equal value, because assessing the value of something according to the value of its equivalent makes them both equal. So, it is said so and so cannot be compared *(yuqas)* to so and so, meaning that they cannot be regarded as equal to each other.

Legal theorists define *al qiyas* as follows: appending an incident, for which there is no text in the three higher sources to an incident for which there is a text and its ruling is assigned to the new incident. The reason for this being that both incidents are equal in the `illah (rationalize judgment based on the facts of the case.)[114] Others define it as a correlation between a known and a known, as regards affirming or denying *a hukm* or judgment, by virtue of a common rationale which affirms the judgment or qualification, or nullifies them.[115]

Another definition still terms it as follows:

The extension of judgment from the original case to a subsidiary case for a common rationale which is not evident from the wording of the text. 116

Accordingly, *al qiyas* it the source that is dependent on reasoning, and is based on its judgment. It is a branch of the three higher sources because it is dependent on them.

From the above we can understand the method by which *al qiyas* is applied. If a legal theorist (mujt*ahid)* is faced by an incident for which there is no judgment in the Munificient Qur'an, or in the Prophetic *Sunnah,* or in the consensus of opinion of Islamic Jurists and scholars, then he resorts to *al qiyas.* He therefore compares the incident at hand to a similar incident for which a

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114 *Usul* As -Sarakhsi vol. *2,* p. 118.

116 Tatazani, *Sharh al Talwih ala alTawdih, 2/52.* 39

115 Ghazali, *AI Mustasfa,* vol.2, p. *228.*

judgment was passed based on one of the three superior sources, provided that the cause or *"illah"* of both incidents is the same.

There are four pillars to *al qiyas:*

The original case: which is the yardstick called *al maqis alayhi.*

The new case: which is called al *maqis* (subsidiary)

The cause or *`illah:* which is an attribute of the original case. Because of its presence, both the original and the new cases have become equivalent.

Ruling *(hukm)* of the original case: *Shari 'ah* judgment concerning which the text first originated, and which will be passed on to the new case.

The jurists quote alcohol as an example when referring to *al qiyas.* There is a clear text in the Munificent Qur'an forbidding it as follows: *(0 you who believe! Intoxicants, and gambling, and al ansab (standards for idols), and al azlam (divination by arrows) are an abomination of Satan 's handiwork. So avoid them in order that you may succeed. Satan wants only to excite enmity and hatred between you with intoxicants and gambling, and hinder you from the remembrance of Allah and from prayer. So, will you not then abstain.)*[117]

It is thus clear that alcoholic drinks forbidden according to the Qur'anic text, the cause *('illah)* being that they cause intoxication.. Now, extract of dates *(nabidh al-tamr)* is a new case on which there is no text forbidding it.

The cause or *'illah* in both the original and the new cases is the same, and therefore the judgment concerning both is the same; that is both are forbidden *(haram.)*

There is a consensus of opinion among the majority of scholars that *al qiyas* is one of the basic sources and original rules of *Shari 'ah.*

Contradicting this opinion was Ibrahim Al Nazzam, the Zahiri School and Shiite jurists who said that *al qiyas* is not an authoritative source.

Following is a review of some of the evidence put forward by both parties:

117 *Surat Al Ma'idah, 90-91.*

Evidence of the Majority

The majority of *'Ulema'* put forward as evidence of their opinion what is mentioned in the Qur'an, the *Sunnah* and the *ijma',* or consensus of opinion among jurisprudents. Regarding the Qur'an, they said that there were numerous verses pointing to *al qiyas,* and quoted the following: *(He is Who drove out the disbelievers among the people of the Scripture from their homes at the first gathering. You did not think that they would get out. And they thought that their fortresses would defend them from Allah! But Allah 's (Torment) reached them from a place whereof they expected it not, and He cast terror into their hearts so that they destroyed their own dwellings with their own hands and the hands of the believers. Then take admonition 0 you with eyes. And had it not been that Allah had decreed exile for them, He would certainly have punished them in this world; and in the Hereafter they shall be the torment of the Fire. That is because they opposed Allah and His Messenger. And whosoever opposes Allah, then verily, Allah is severe in punishment.)*[118]

Thus Allah Almighty related to the believers the torment which happened to Banu Nadir, and followed that by saying: (Then take admonition, 0 you with eyes.) The admonition is therefore by way of analogy *(al qiyas),* in the sense that anyone who opposes Allah will have the same plight as Banu Nadir.

From the *Sunnah,* they mentioned as evidence a number of *hadiths.*

. First: The *hadith* of Mua'dh Ibn Jabal who said that before *sending* him to Yemen the Prophet asked him: " How would you pass judgment if you were asked to do so? He said: I would refer to Allah's Book" And the Prophet said: "And if you do not find it in Allah's Book?" He said: I would refer to the *Sunnah* of Allah's Messenger. He said: "And if you do not find it in the *Sunnah* of Allah's Messenger, nor in Allah's Book?" He said: I would endeavor *(ajtahidu)* to form an opinion, and I would spare no effort in so doing. Then the Messenger patted him on the chest and said: "Praise be to God for having favored the Messenger of Allah in that which pleases Allah and His Messenger".

This *hadith* is evidence of *al qiyas,* because there is an endeavour *(ijtahidu)* to form an informed opinion.

118 *Surat Al Hashr,* 2-4.

Second: It is related that on numerous occasions the Prophet (Pbuh) would use *al qiyas* to answer questions addressed to him. Of these occasions it is related that a man from Kheth'am asked the Prophet about the permissibility of going on a pilgrimage on behalf of his father. He said that the time of al Hajj came when his father was an old man and unable to travel, and that he had died without observing it. And the Prophet asked: "Are you his eldest son?" And the man said, "yes". And the Prophet (Pbuh) said: "Do you think that if your father was in debt to someone and you paid that debt, would this relieve him of the burden of the debt?" And the man said, "Yes". And the Prophet said: "Go then and perform the Haj on behalf of your father".

Third: It . is narrated that `Umar Ibn il Khattab came to the Prophet saying: "I have committed today a great error. I kissed my wife while I am fasting. And the Prophet asked: "What would be the case if you rinsed your mouth with water while fasting?" And `Umar answered: It would be all right. And the Prophet said: "Why then (this feeling of regret)?"

The inference is that the Prophet (Pbuh) likened through *(al qiyas)* the kiss of the fasting person to his spouse to rinsing his mouth with water while fasting, and passed upon it the same judgment. Therefore, the fact that the Prophet himself (Pbuh) used *al qiyas* to pass judgment, then this means that it is permissible.

Following is the evidence put forward by consensus of the *'Ulema* in favor of *al qiyas.*

1. One day Abu-Bakr was asked about al kalalah and he said: "I shall venture an opinion, and if it is right then it is from Allah, and if it is wrong, then it is from Satan; and he said: " Al kalalah applies to all except father and son". Therefore it applies to the person who dies leaving neither descendants nor ascendants as heirs, as mentioned in Allah's Words: ***(They asked you for a legal verdict Say: Allah directs thus about al-kalalah. If it is a man that dies leaving a sister, but no child, she shall have the inheritance. If (the deceased) is a woman, who left no child, her brother takes her inheritance. If there are two sisters, they shall have two-thirds of the inheritance; if there are brothers and sisters, the male will have twice the share***

of the female. Thus does Allah make clear to you (His Law) lest you go astray. And Allah is the All-Knower of everything.)[119]

2. It is narrated that Abdullah Ibn Abbas was of the opinion that the presence of the grandfather would exclude all the brothers from the inheritance likening it to the presence of the father. On the other hand, Zayd Ibn Thabit was of the opinion that the brothers should share with the grandfather in the inheritance. Accordingly Ibn Abbas said: "Will Zayd Ibn Thabit not fear Allah: he has placed the grandson on the same footing as the son, and he does not want to place the grandfather on the same footing as the father". He said this because the degree of kinship of the grandfather is the same as that of the grandson, and this is *al qiyas* (legal analogy).

3. Someone came to `Umar Ibn Al Khattab saying that Samrah Ibn Jundub had taken wine from the merchant Jews as part of their tithes, then he turned it into vinegar and sold it. And `Umar said: "Allah will punish Samrah. Doesn't he know that the Prophet (Pbuh) said that Allah has cursed the Jews because he forbade them to eat fat so they embellished it and sold it, and ate with the money they made from it.

   Thus `Umar compared and equated through *(al qiyas)* the wine which Samrah accepted as tithe although it was *haram,* to the fat which the Israelites fraudulently converted into something else, thereby making it *halal* and selling it. This is a sound *qiyas* from `Umar, and there are many other similar incidents narrated concerning outstanding companions of the Prophet. They all indicate that the Companions used *al qiyas* in their judgments, and nobody ever questioned them in this matter. This is evidence that it was *ijma'* on their part.[120]

Evidence put forward by those who deny the validity of *al qiyas*

Those who denied the validity of *al qiyas* put forward a great deal of evidence of which we shall mention the following:

1. That *al qiyas* was based on assumptions, and that Allah Almighty forbade assumptions and discredited them as in His saying: *(And*

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119 *Surat An Nisa,* 176.

120 Sha'ban, *Usul,* 103.

follow not that of which you have no knowledge)[121] Allah also said: *(They follow but a guess, and verily, guess is no substitute for the truth.).*[122] They say that *al qiyas* is an assumption by the *mujtahid* that the judgment of the event occurring is the same as the judgment of *al qiyas alayhi* (or the original), and as assumptions are forbidden, therefore it is not permissible to use them in evidence in matters of *Shari 'ah.*

In answer it may be said that the forbidden assumption is related to belief and the fundamentals of religion, while the subject at hand is a practical legal matter, and there should be no objection to proving them by means of al *qiyas.*

2. That many of the Prophet's Companions censured subjective opinions, and that *al qiyas* is just that, and therefore is subject to censure. Many incidents are quoted in this respect. One of these is that when Abu Bakr was asked about al kalalah and he answered that he would have no place on earth nor in the sky (i.e. would have exceeded all limits) if he ventured an opinion, which opinion is interpreted to be the same *al qiyas.*

   `Umar Ibn il Khattab is quoted as saying: "Beware of those who make judgments based on opinion *(ra 'y),* for they are the enemies of the religion. They were both to learn the *Sunnah*, but they preferred subjective opinion, and they went astray". Subjective opinion in this case would be al *qiyas.* Also Ibn Abbas is quoted as admonishing people for foregoing the knowledgeable and the righteous to seek guidance from those who make *(qiyas)* on matters by individual judgment or opinion.

   Aliyy Ibn Abi Talib is also quoted as saying that if religion was a matter of decisions based on personnel opinion, then it would have been preferable to wipe the interior of the khuff when wearing this foot cover during ablutions rather than its surface whereas he had seen the Prophet wiping the surface and not the interior.

   The majority of *'ulema* answered these narratives by saying that they contradicted what the Companions said about al *qiyas* and their application of it.

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121 *Surat Al-Isra', 36.*

122 *Surat An-Najm, 28*

Even if these quotations are true, they are opposed to the fact that the Companions did practice *al qiyas.* Therefore, there has to be reconciliation between these stories and acts of the Companions, by referring their censure to the individual opinion which is not based on sound foundations, but which is based on whim. However, corroborated *qiyas* which fulfills all the required conditions is commended and practiced by them.

3. Refuters of *al qiyas* also said that it leads to differences and dissension between Muslims. They claim that every *mujtahid is* trying to unearth the *`illah* or cause, and to ascertain its presence in the new case as in the original case. All of these, they claim, are matters of speculation which lead to differences and dissension and which are forbidden by Allah Almighty Who Says in the Munificient Qur'an: *(Do not dispute (with one another) lest you lose courage and your strength departs)*[123] and *(And be not as those who divided and differed among themselves after the clear truths had come to them. It is they for whom there is an awful torment.)*[124]

The answer to this is that the dissension which is forbidden is in matters related to the fundamentals and tenets of religion, while we are talking about judgments over practical issues; and there is a great deal of difference between the two.

These are both sides of the argument. The researcher cannot but side with the opinion of the majority of *'ulema,* because *al qiyas is* an original source and one of the sources of *tashri' (Shari 'ah.)* It helps the *mujtahid* to find solutions to matters for which there is no original text. This renders Islamic *Shari 'ah* flexible and applicable to all times and ages.

Examples *of Correct Qiyas*

The judgments passed on the basis of al *qiyas* are too many to enumerate. We shall venture to mention a few examples, in addition to what we have mentioned about wine and intoxicants:

1. The Prophet (Pbuh) said that "the murderer does not inherit". He who murders the relative from whom he inherits, in an attempt to speed up

123 *Surat Al Anfal,* 46.
124 *Surat Al-'Imran,* 105.

his laying hands on his inheritance, should be dealt with in a manner negating his intent. Because he wanted to take his due prematurely, then he should be punished by being deprived of his due, say the *'ulema*.

Likewise, by using *al qiyas*, then if the beneficiary of a will murders the person who has drawn the will, in order to speed up his control over his share, then he, as well, should be deprived of his due. The fact that both wished to speed up their taking possession of their share is the *`illah* or cause. Therefore murdering the inherited person is the original case and yardstick *(al maqis alaylih)* and murdering the person drawing the will is the new case, which is compared to the original. The judgment or *hukm* which should be affirmed is depriving the beneficiary of the will of his relative.

2. Prophet Muhammad (Pbuh) said that: all faithful Muslims are brethren, and he forbade one brother to offer more in price of a commodity if his brother Muslim wishes to buy it. He also forbade the Muslim to engage in marriage a woman already engaged to another Muslim, but he should wait until the first fiancee leaves her, or look for someone else. The *'ulema* applied *al qiyas* to leasing which is analogous to buying, and forbade one person to raise his offer for a lease over that made by his brother Muslim because it causes enmity and dissension. Therefore buying the object which another person desired or engaging in marriage a woman already engaged to another is the original or *al-maqis alayhi*, while offering more for a lease is the new case or *al-maqis*. The clear prohibition as mentioned in the *hadith* regarding the first two cases is the judgment or *hukm* and should be applied to the new cases. The harm and enmity are the *`illah* or cause.[125] The examples *of al qiyas* are many as we have mentioned, and the reader can refer to the detailed studies in the books about the principles of jurisprudence.

[125] Sha'ban, *Usul*, 100.

Fifth Source
Al Istihsan (Juristic Preference)

Al Istihsan in the Arabic language means regarding something as being beautiful or good.

According to the terminology of legal theorists, it means that the *mujtahid* deviates from the application of an apparent *qiyas* and applies instead an implicit *qiyas,* or prefers an exceptional ruling *(hukm) to* an absolute ruling because of evidence which, occurred to him justifying this shift.[126]

Therefore, if a matter for which there is no clear text concerning its ruling is brought before a *mujtahid,* and if he finds two varying points of view, one apparent and the other hidden, requiring varying rulings; and if evidence is formed in the mind of the *mujtahid* causing him to waiver the clear and obvious point of view; this then is called *Istihsan* or preference. Likewise, if there is an absolute ruling *(hukm)* concerning a certain matter, and the *mujtahid* finds evidence in his mind requiring that he makes exception of this matter as regards the absolute ruling and adopts instead another partial ruling; this endeavor is called *istihsan* or preference.

This is *istihsan* according to the Hanifites.

Al Imam Ash-Shafi'e refuted the validity of *istihsan,* making his famous statement that he who sets himself to make preferences *(istihsan)* sets himself to make *Shari 'ah.* This cannot be, because Allah Almighty alone makes the *Shari 'ah* and then He informs His servants through His Messenger, who are the Prophets (Pbuth.)

Types of Istihsan

It is obvious from the definition of *isthihsan* that it is of two types:

First: Implicit *qiyas* taking precedence over explicit *qiyas.* A case in point is the stipulation of the Hanifite jurists who said that if a person endows a piece of agricultural land, then it follows that the water rights, drinking rights, and the right of passage are implicit in the endowment

126 al-Taftazani, Al Talwih Wal Tawdih 2/81, Khallaf, 'Ilm Usul, p.79, Sha'ban, Usul al-Fiqh, p. 144.

without being explicitly mentioned, by way of *istihsan.* However, according to *qiyas,* it has to be explicitly stated as in a sale contract.

The argument in favor of *istihsan* in this instance is that the purpose of the 'endowment (w o e is to benefit the party to whom it is endowed. However, no benefit can be derived from the agricultural land without drinking rights, water rights, and the right of passage**.** Accordingly, these rights are inherent in the endowment even if they are not mentioned outright, because without these rights the purpose of the endowment would not be fulfilled. A similar case is that of *ijarah* (i.e. leasing.)

The explicit *qiyas* in this case is to apply to the endowment what is applied to a sale contract, while the implicit *qiyas is* to draw an analogy between the endowment *and ijarah.* The intent of both is usufruct, and as the above mentioned rights are included in the *ijarah* without being mentioned, they are also included in the endowment of agricultural land without being mentioned.

Second: Partial exception from an overall ruling. A case in point is that the wise legislator forbade the sale of nonexistent commodities, as well as any concluding contracts concerning them. However, acting from the premise of *istihsan,* he allowed it in the case of *salam* (forward **buying),** *ijarah, mozara'ah, musaqah* and *istisna'.* All of these are contracts, and the items or goods are nonexistent at the time of the conclusion of the contract. The argument in favor of *istihsan* is the need of the people for these goods and the customs pertaining to them.

From the preceding, it is clear that *istihsan* is not an independent source of *Shari 'oh,* because the evidence for the rulings of the first type is implicit analogy, which has taken precedence over explicit *qiyas;* while the evidence for the rulings of the second type is the common benefit of the people which made it necessary to make an exception.

Going back to Imam Ash-Shafi'i (Allah's mercy be upon him) on *istihsan,* we would like to add that in "Al Rissala" he likened the person who makes a ruling *(hukm)* based on *istihsan* to a person who chooses a direction for prayers out of *istihsan* that it is the Ka'bah, without any of the solid evidence put forward by the Legislator indicating the proper direction of the Ka'bah. He also said that *istihsan* is tantamount to pleasure-seeking; and that if *istihsan*

were to be permissible in religion, it would be so for the intellectuals rather than the scholars. It would also be permissible to make *Shari 'ah* by *istihsan* in every branch of religion, and each person . would be permitted to make his own *Shari 'ah.*[127]

Notwithstanding these arguments, it seems that all Imams practiced *istihsan,* and not only the Hanifites. In fact, some of the opinions put forth by Imam Ash-Shafi'i were based on ***istihsan.*** Of these is what was narrated by Al-Amidi in his book *(Al lhkam fi Usul Al Ahkam),* that Imam Ash-Shafi'i said that in the matter of Al Mut'ah (compensation paid by a husband to his divorced wife) he prefers *(astahsinu)* that the sum of money paid be thirty dirhams. On the matter of the right of *shufah* (preemption), he said that he prefers that the interval be for three days. On another occasion he said that if the thief put forward his left hand instead of his right, then it can be cut off. However, *according* to *qiyas,* it is his right hand that should be cut off, and according to *istihsan* it should not be cut off'[28]

It is written in . Al-Musawwadah that Imam Ahmad b. Hanbal applied *istihsan* in many instances. According to Al Maymuni he said that he prefers *(istahsana)* that a person makes sand ablution every prayer time. According to *qiyas,* it can be used instead of water until water is available. With regard to a person who usurps a piece of land and then cultivates it, he said that the crop should go to the owner of the land, while the usurper would pay the expenses. This is contradictory *to qiyas,* according to which the landowner pays the expenses incurred to the usurper.[129]

Those who differ as to the permissibility of *istihsan* have not specified their understanding of it, nor have they agreed as to what they want from it. Had they come to terms regarding these matters, they would not have differed about its permissibility. Shaykh Abdul Wahab Khallaf (may Allah be merciful to him) said that it is apparent that those who have differing views regarding *istihsan* are not agreed as to its terms of reference. For those who apply it interpret it differently from those who do not. Had they agreed as to its definition, they would have agreed as to its application. He added that upon close scrutiny, *istihsan* is foregoing an explicit evidence or an absolute judgment *(hukm)* in favor of evidence which necessitates this shift, and not on the basis of a mere whim. He said that all judges have experienced the occasions when they glean a

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127 Al-Shafi'a, *Ar-Risala,* p. 35 onwards, Khallaf, *`Ilm_Usul,* p. *83.* v.3,

128 138.

129 *Al Muswadda* by Ibn Taymiyya vol.3, p. 138; Shaba'an, *Usul,* p. 155.

real benefit which necessitates foregoing the explicit stipulations of the law in this partial ruling; this is no other than *istihsan*. For this reason, Imam Ash-Shatibi said in Al- Muwafaqat that he who applies *istihsan* does not refer merely to his own personal taste, but he refers to his knowledge of the intent of the Lawgiver in similar cases. For example, there are matters which, according to *qiyas,* should be judged in a certain way, but in so doing the judgment would pass over a *maslaha* (benefit) or bring about a certain *mafsada* (harm.)[130]

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130 Khallaf, 'Il*m Usul al Fiqh,* Dar al Qalam, Cairo, 12[6] edition, p. 83.

Sixth Source
Al Masalih al Mursala (Unrestricted Interests)

In Arabic, *maslaha* (singular of *masalih)* means to bring about utility and fend off damage or injury.[131]

To legal theorists, *masalih mursala* means those interests for which no provisions have been expressly prescribed as applicable by the Supreme Lawgiver, nor does there exist any evidence from *Shari 'ah* to testify their invalidity.

Masalih mursala are so termed because they are not exclusively governed by any evidence of either validity or invalidity.[132]

In more detail, at all times and places new incidents and developments always occur, and these are too many to be encompassed by the provisions of the exalted *Shari 'ah.* Since it is the will of Allah Almighty for *Shari 'ah* to remain workable and fit for every time and place, it is essential, therefore, to develop for such incidents, *Shari 'ah* provisions that are governed by original texts, without departing from their spirit and goals. Otherwise, such provisions will be neither legal nor acceptable.

In general, *masalih mursala* are divided into three categories:

First: *Al Masalih al Mu 'tabara* (interests recognized by the Supreme Lawgiver) including the following:

- Protection of the intellect for which the Supreme Legislator has prohibited drinking wine and prescribed penalty for it.
- Preservation of life, where Allah Almighty has ordained the prohibition of murder and prescribed *qisas* as a penalty for its perpetrator.
- Protection of property, where Allah Almighty has ordained the prohibition of stealing and prescribed amputation of the thief's hand as

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131 Al Ghazali, *Al Mustasfa* vol.2, p. 139, al-Shatibi, *Al Muwafagat* vol.2, p. 37, Zeidan, *al-Wajiz,* p. 236.

132 *Khallaf, 'Ilm Usul,* ***p.84.***

penalty. He also prohibited gambling and *riba* (usury) and prescribed mandatory compensation to be paid in case of causing damage to other's property.

o Preservation of honour, where the penalty *(hadd)* of slander was prescribed.

Upholding of religion, were Jihad was prescribed along with a penalty for those who advocate pernicious innovation *(bid* 'a.)[133]

For this category of ***masalih mursala,*** the Supreme Legislator has prescribed explicit provisions that ensure they are properly maintained. Therefore, they should be adopted, enforced and complied with.

Second: *Al Masalih Al Malgha* (invalidated interests): Examples of this category include surrender to the enemy. Although, in this respect there is an apparent interest represented in the protection of life from death or injury as well as the preservation of property, yet this personal interest was invalidated by the Supreme Legislator who, instead, enjoined Muslims to fight against their enemy in favor of defending Muslim territories. In this respect the Qur'an says: ***(Fighting is prescribed for you and ye dislike it. But it is possible that ye dislike a thing which is good for you and that ye like a thing which is bad for you. But Allah Almighty knoweth and ye know not.)*** [134] ***(O ye who believe!, when ye meet the Unbelievers in hostile array, never turn your backs to them. If any do turn his back to them on such a day- unless it be in a stratagem of war, or to retreat to a troop (of his own)- he draws on himself the wrath of Allah Almighty and his abode is Hell- an evil refuge (indeed.)***[135]

As an example of this category of interest *(maslaha),* it was reported that the Ummayyad King of Andalusia Abdur-Rahman Ibn al Hakam, known as Adur-Rahman Ad Dakhil once cohabited with one of his wives during the month of Ramadan and repented his wrongdoing. Calling Muslim scholars for religious opinion *(fatwa),* Yahya Ibn Yahya, a legist of Andalusia advised him, in atonement of his sin, to

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133 Al-Shatibi, *Al Muwafaqat,* 2/10; Sha'ban, *Usul al-Fiqh,* p.131.

134 *Surah Al Bagara, 216.*

135 *Surah Al Anfal,* 15-16.

fast for two consecutive months. The other scholars *('ulema)* blamed Ibn Yahya for his *fatwa,* questioning why he did not advise the ruler on the basis of his adopted doctrine of Imam Malik (May Allah have mercy on him), which, provided, on this issue, one of three options; either to release a slave, provide food to paupers or fast for two months consecutively. In reply, Ibn Yahya said that considering that the ruler was rich and had many slaves, should we make such options open for him, we would be making it easy for him to repeat such act and then release a slave. That is why he forced on him the more difficult option so that he would not do it again.

The *maslaha* (interest) selected by Imam Ibn Yahya is invalidated by the Supreme Legislator who prescribed, as penance for such a sin according to the Malikite doctrine, three optional penalties; either release of a slave, or to provide food to paupers or fast for two months consecutively.

According to other Imams, however, the penalty of releasing a slave is mandatory if one can afford it and so is fasting if he cannot afford the former. If he cannot even afford fasting, he should provide food to paupers.

The *maslaha* (interest) entailed in the atonement by fasting is in conflict with the more preponderant interest of releasing slaves and providing food to paupers, which has been enjoined by the Supreme Legislator on several occasions. Inhibition *(al-zajr)* in this respect is specific to that ruler and the like of him.[136]

The question of giving equal share of inheritance to brother and sister is another example of invalidated interests. This is based on the divine command as expressed in the Qur'an *(Allah (thus) directs you as regards your children 's (inheritance): to male a portion equal to that of two females.)*[137]

Similarly, a usurer's *(murabi 's)* interest in maximizing his money is one that is invalidated by the Supreme Legislator based on numerous

136 Sha'ban, *Usul,* p. 133.
137 *Surah An 'Nissa, 11.*

evidences as to prohibition of *riba* including the Qur'anic text: *(But Allah bath permitteth trade and forbidden usury.)'''*

These so-called *masalih* (interests), being invalidated by the Supreme Legislator should not be applied nor taken into consideration.[139]

Third: *Masalih morsalah* (unrestricted interests) are those interests for which no express provisions as to their validity or invalidity are prescribed by the Supreme Legislator. Although they are void of any express evidence testifying to their legal validity, yet, the spirit, goals and objectives of the exalted *Shari 'ah* support their validity.

It should be recalled here that this was instituted only to realize interests and fend off harm and damage. In this respect, Ash-Shatibi (May Allah have mercy on him) says: " The Supreme Legislator has **ordained** the *Shari 'ah* with the . intention of realizing *masalih* (interests) for this world **and** the hereafter".[140]

Al Ezz Ibn Abdus-Salam (May Allah have mercy on him) says: "The *Shari 'ah* abounds in benefits, as it either maintains *masalih* (interests) or wards off *mafasid* (harm)".[141]

Imam Ibn Al Qayyim (May Allah have mercy on him) also says: "In core and crux, the *Shari 'ah* is based on wisdom, utility for the people in this world and the hereafter. It all reflects justice, benefit and reason. Any issue that marks a departure from justice to injustice, from mercy to cruelty, from benefit to harm; from reason to insanity, has nothing to do with *Shari 'ah,* even though it were forced in by interpretation *(ta'wee!.) Shari 'ah* is the embodiment of Divine justice and mercy for His creature".[142]

Can Masalih Mursalah be Taken as Binding Evidence?

To answer this question, we have to point out that there are two opinions by Muslim scholars:

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138 *Surat Al Baqara, 275.*

139 *Zeidan, al-Wajiz,* p. *237.*

140 al-Shatibi, *Al Muwafagat, vol.2,* p. *37.*

141 Izz b. Abdus Salam, *Qawald al Ahkam* (Rules of judgment), 1/9, Zeidan, al-Wajiz, p. 240.

142 Ibn Qayyim, *Al Turuq al Hokmiyya* (Rules of Judgment), p. 14. 54

Consensus of the majority

The majority of scholars are in agreement on the applicability of absolute interests in drawing up legislation. The four `Imams were unanimous on this subject; and reports that it was only Imam Malik that adopted the principle of unrestricted interests are no true.

The Four Imams based their argument on the following:

1. The above-mentioned story of Mu'adh (May Allah be satisfied with him) purporting that the Prophet (Pbuh) had approved the former's approach of juridical rulings *(ijtihad)* on issues not covered by express provisions of the Qur'an or *Sunnah. ijtihad* is conducted by making analogy *(qiyas)* between cases and interpreting the overall goals of *Shari 'ah,* which means specifically to adopt the principle of unrestricted interests.

2. The Prophet's Companions (May Allah be satisfied with them) used to base their judgments on unrestricted interests and none of them denied the validity of this. Hence comes their consensus on this issue.

Among the issues, where they based their judgment on the principle of unrestricted interests, are the following:

(a) The Prophet's Companions (May Allah be satisfied with them) during the reign of Caliph Abu Bakr unanimously agreed to collect the sheets whereon the Qur'an was inscribed. This was **proposed** by `Umar Ibn it Khattab in the interest of safeguarding the Qur'an.

(b) Caliph Abu Bakr (May Allah be satisfied with him) selected `Umar Ibn al Khattab (May Allah be satisfied with him) as his successor in the interest of Muslims based on the latter's recognized merits of capacity, asceticism, devotion and piety.

(c) A case where a man married a woman during her obligatory period of waiting for the next marriage *('iddah)* was brought to Umar Ibn al Khattab (May Allah be satisfied with him) who adjudged them to remain separated for life, by interdicting the man's marriage with this woman even after the expiry of her *Iddah.* This was intended as a check against this and similar transgressors who contemplate violating sanctities of Allah Almighty. (Probably this judgment was made on *qiyas* basis by drawing an analogy with the case of disinheriting an

inheritor if he kills his legator. Here, the penetrator is penalised with a measure contrary to his intent for his attempt to prematurely forestall the normal course of events.)'[43]

(d) Umar Ibn al Khattab (May Allah be satisfied with him) left conquered territories in the hands of their local inhabitants so as to take charge of farming land, instead of distributing them to those entitled to spoils of war, as previously mentioned. This decision was also based on *maslaha* (interest.)

(e) At the time of Uthman Ibn `Affan, the third of the Rightly Guided Caliphs, there were several versions of the Qur'an, therefore the Caliph brought about general consensus on one version and burned down the rest.

As the number of Muslims grew at the time of 'Uthman Ibn 'Affan, he decided, to introduce the second call *(adhan)* to the Friday prayer. As *adhan* was a means of mass communication, he believed that the second *adhan* would serve this purpose.

(t) Caliph 'Uthman Ibn 'Affan (May Allah be satisfied with him) adjudged that a woman who was pronounced thrice as divorced is entitled to inherit if her husband dies during *('iddah)* should it be proved that divorce was intended as a means of disinheriting her. (Probably) this judgment was made by *qiyas* on the basis of drawing an analogy with the case of disinheriting an inheritor if he kills his legator. Legal theorists have termed this kind *of qiyas* as reverse analogy *(qiyas a!-'aks),* as the judgment passed for the subsidiary issue is contrary to that prescribed for the original.)

(g)

(h) The Rightly Guided Caliphs *adjuged* that artisans such as tailors and dyers should be provided with security or guarantee, in order to safeguard people's property entrusted to them. In this connection, Imam Ali Ibn Abi-Talib (May Allah be satisfied with him) says, "Nothing but this (guarantee) can protect the people's interest".)

3. The purpose of legislation is to protect people's interests *(masalih),* which are perpetually changing and increasing beyond count. Should Muslims be confined to the premise that no judgment shall be valid unless supported by a provision that is applicable to the incident, life

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143 *Sha'aban, Usul al-Filth,* p. *137.*

will be extremely difficult and many interests and rights will be wasted away. As the goals of the exalted *Shari 'ah* are clear-cut, these goals, rules and stipulations may be taken as guidelines in adjudging new incidents and occurrences.[144]

From the foregoing, it can be seen that according to the majority of scholars, *masalih mursala* should be applied and enforced. However this view was opposed by the Zahirites, and some Shafi'is and Malikis, like Al-Amidi and Ibn Hajib who rejected *masalih mursala* as an evidence or source of *Shari 'ah,* based on the following arguments:

The argument against *Masalih Marsala:*

1. Certain interests *(masalih)* have been recognized as valid and expressly stipulated by the Supreme Legislator, while others have been invalidated. *masalih mursala* oscillate between both categories; sometimes considered as expressly recognized, other times as invalidated. This is an equivocal and doubtful situation, on which no judgement may be based.

   In reply to this argument, the majority of scholars say that advocates of the legality of *masalih mursala* do not claim that such a category of interests are conclusive or final, but rather seem prima facie as such. According to *Shari 'ah,* judging on prima facie evidence is allowed.

2. Judging based on *masalih mursala is* the practice of dissenters and those who are not qualified to give independent rulings *(ijtihad),* who approve only matters to their own convenience. This would undoubtedly mean putting on the cloak of the Lawgiver. In his "Sharh al-Mahsoul" al-Qarafi says, "Should this be allowed (meaning Judging based on *masalih mursala),* it shall be permissible for any judicious person who is knowledgeable and well-informed of aspects of policies to adopt whatever he deems at his own discretion to be right and fit even after he has consulted Muftis (for legal pronouncements) on a certain incident and has been told that it is not stipulated nor supported by any matching precedent. This is a difficult task that no pious man can dare to approve. [145]"

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144 *Id.*

145 Al Qarafi, *Sharh al Mahsul, 3/20.*

In reply to this argument, it is said that judging by *masalih mursala* is the practice of jurists qualified for *ijtihad* rather than dissenters. Thus the objection is refuted.

3. The All-Wise Lawgiver has created a law that realizes people's interests *(masalih)* and fends off *(mafased)* harm to them, all of which are pointed out in detail. Among the objections to judging by *masalih mursala* is that this contradicts the divine pronouncement in the Qur'an: We have neglected nothing in the Book.[146] *(Does man think that he will be left unguided (without purpose?.)*[147]

   This is a weak argument because judging *by masalih masalih mursala* in fact does not contradict the divine Statement in the Qur'an: (Does man think that he will be left unguided)? Since it is the will of the Supreme Legislator that *Shari 'ah* should be workable at all times and places, He has left many of the subsidiary provisions , to the discretion of Muslims qualified for *ijtihad* (legal rulings), who may give their own opinions in the light of the general principles and rules set forth by Allah Almighty. It is by judging on the basis of *masalih mursala* that the purposes and goals of *Shari 'ah* are realized and divine justice enforced.

Ittihad-based legal rulings by Muslim legists who adopted the principle of *masalih mursala* include the following:

"According to *a fatwa* by Malikites, the most qualified among the non-*mujtahid (mujtahid* is a legist formulating independent opinion on juridical matters) may be appointed as Imam in the absence of any *mujtahid.* Similarly, it is permissible to give pledge of allegiance *(bay 'ah)* to the lesser qualified of the two candidates for leadership. Taxes may be levied on the rich should *Baytul-Mal* (Public Treasury) be void of sufficient funds to meet necessary state expenditures such as those required to provide for army needs, until sufficient funds are made available in *Baytul-Mal*".[148]

Ash-Shatibi (May Allah have mercy on him) even went further beyond borrowing *(istiqrad)* to allow levying taxes on the rich *(tawzif)* rather than collecting money on loan basis. In this respect, he says: " Borrowing in times of

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146 *Surah Al Andm, 38.*

147 *Surah Al Qiyamah, 36.*

148 *Malik* by Shaykh Muhammad abu Zahra, p. *402; Usul ul Fiqh* by the same author, p. *286;* Zeidan, *al-Wajiz,* p. *243.*

crisis may be made in case where potential income to Baytul-Mal is expected to accrue. Otherwise, if nothing is expected and sufficient sources of income are dwindling additional taxes may be levied on the rich" [149]

The Malikites also recognized as admissible testimony given by minors against one another in cases of injury, by way of exception from the legal requirements for a valid witness to be adult and upright, in order to protect rights. *According* to the Malikites: "If we do not accept testimony of (minors) against each other, their lives will be wasted in vain".[150]

Ash-Shafi'ites made it permissible to exterminate animals used by the enemy and ruin their trees, should this be required to fight, conquer and overpower the enemy.[151]

According to the Hanafites, Muslims may bum down property and livestock earned as war booty from the enemy, in case they are unable to carry them home. They should slaughter the livestock and bum down their meat and other stuff lest the enemy should benefit by them.[152]

Imam Ibn Hanbal (May Allah have mercy on him) has given *fatwa* that the agents of corruption may be exiled to where people are safe from their mischief. [153]"

He also held that a father may exclusively grant some of his sons a gift *(hiba)* in excess of the share of his brothers and sisters, on the basis of the fact that the latter is sick, needy (student) or has a large family.[154]

According to *fatwas* by Hanbalite legists, the ruler may force monopolists to sell their goods at the market price, in the event of public need. He may also force craftsmen and artisans of products needed by the people to work for. fair wages, should they refrain from performing their jobs.

If someone needs to take water to his land across another's property without causing damage to its owner, he is authorized to do so even against the will of the latter. This practice, being reported of `Umar Ibn al Khattab as

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149 Al-Shatibi, *Al- I'tisam*, vol.2 *p.305,* as quoted by Shaykh Abu Zahra; *Usul al Fiqh,* p. *286.*

150 Ibn Qayyim, *AlTurug Al Hukmiyyah, p.* 172.

151 *Al Ashbah wal Naza'ir by* As Suyuti, p. 60; Zeidan, *al-Wajiz, p. 243.*

152 *Ar-Radd Ala Siyar al Awza 'ie* by Imam Abi Yousof, p.3; Zeidan, *al-Wajiz,* p.243.

153 Ibn Qayyim, *At Turuq al Hukmiyyah,* p. 14. Ibn Qudamah, *Al Mughni,* vol.6, p. 107.

adopted by Ahmad Ibn Hanbal on the strength of one of the two reports. This is also adopted by some Hanbalites, and considered to be "the right opinion to be adopted since arbitrary use of rights is prohibited in *Shari 'ah.* This issue represents an instance of the prevention of abuse of proprietary rights".[155]

Ibn al Qayyim (May Allah have mercy on him) says: "If it so happens that some people are obliged to dwell in a man's house that is the only refuge for them, or an inn owned by someone else, if they have to borrow some clothes to keep them warm, a grindstone to grind their grain (for food), a bucket to get water (out of a well), a pot or pan, axe or the like, the owner of such things should offer them willingly (without quarreling.) As to the question whether he may charge a fee, scholars have given two opinions. According to the Hanbalites, there are two alternatives:

Those who authorized the owner to charge a fee have in the meantime interdicted him to ask for anything in excess of market price.

Our Shaykh says, "The right course to take is that such things should be offered free of charge as evidenced by the Qur'an and *Sunnah* and shown in the following verse of the Qur'an: (So *woe to the worshippers who are neglectful of their prayers, those who (want) to be seen (as pious men), but* refuse to (supply) (even) small neighborly needs.)* [56] According to Ibn-Mas'ud, Ibn-Abbas and other Companions of the Prophet, *ma 'un* means *lending* pots and pans, buckets, axes and the like.[157]

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155 Ibn Qayyim, *At Turuq a! Hukmiyyah, p.239;* Zeidan, Wajiz, p. 243.

156 *Surat Al-Ma 'un, 4-7.*

157 Ibn Qayyim, *Al Turuq Al-Hukmiyya,* p. *260,* Dar Al Kotub al `Ilmiya, Beirut, *p.260.*

Seventh Source

Saddudh Dhara'i' (Blocking the Means)

Adh 'dhara 7' in the Arabic is the means used to attain an end whatever that end may be. In *Shari 'ah* terminology it is a means used in order to attain something forbidden by *Shari 'ah.*

Sadd means obstructing something and preventing people from it.

Dhari 'a could also have a more general meaning. It might mean the means or the expediency toward something else, whether it is *haram* or *halal.* Therefore if it is a means to something *haram,* then it is forbidden, and if it is a means to something *halal* then it is permissible.[158]

Ibn–al-Arabi defined it as "every act that has the appearance of being permissible, but that leads to something forbidden".[159]

Al-Qurtubi defined the means *(dhari 'ah)* as "a matter which is not forbidden in itself, but which is feared might lead to something forbidden, if committed".[160]

Shaykh Al-Islam Ibn Taymiyah defined it as that which is the means and path to something. However, *saddudh-dhara 'i' is* of great standing in *Shari 'ah,* and is intended as a shield that prevents Muslims from committing *haram,* . and induces them to do good. In this context, Ibn- al-Qayyim has said: "Since the purposes of *Shari 'ah (al-magasid)* cannot be realized except through ways and means of attainment, therefore these ways and means are subservient to them. Abomination and forbiddance of the means to sins and matters which are *haram* are commensurate to the extent to which they attain their purposes. The means to an objective is related to that objective, and both are a concern of the *Shari 'ah,* one is the intent of the objective, and the other is the intent of the means.

Therefore, if Allah Almighty forbids something, and there are ways and means of attaining it, then He forbids them (the ways and means) as well, to

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158 Shaykh Muhammad Abu Zahra: *Usul Al Fiqh, p. 228.*

159 Ibn al= Arabi, *Ahkam Al Qur 'an,* vol.2, p. *798,* Dar Al Ma'rifa edition, Beirut, edited by All Muhammad Al Bajawy.

160 Al-Qurtubi, *Al Jam'i'* li *Ahkam Al Qur'an vol.3,* pp. *57-58.*

affirm His forbiddance. If He allows the means and expediencies which lead to what is forbidden, then this would impair the forbiddance and a source therefore of temptation; and His Wisdom and Divine Knowledge would never tolerate such a course. Indeed, even the policy of the temporal rulers and kings would forbid their soldiers and subjects or even their households (from) doing a certain thing, and then allow them the ways, means and expediencies that would lead to it; they would be contradicting themselves, and would receive from the subjects that which is opposed to their original intent.

Likewise, when physicians wish to put an end to a disease, they prevent the patient from the ways and means that feed the disease, otherwise there would be no cure. What then of this perfect *Shari 'ah,* which is the highest level of wisdom, welfare and perfection? Anyone who contemplates its sources and resources knows that Allah Almighty and His Messenger have closed any means that might lead to iniquities by forbidding them and labeling them as sinful".[161]

Ash-Shawkani said: *Adh-dhari a* is a matter which seems permissible, but which leads to prohibition. Imam Malik supported the view of blocking the means, while Abu Hanifa and Ash-Shafi'i said that it should not be forbidden.[162]

Imam Ahmad Ibn-Hanbal also said that it should be prohibited.

The Al-Zahyriya did not support blocking means, because they support only that which is apparent. Likewise, they do not support al-qiyas or *masalih mursala.* 163

The differences of opinion between the four Imams may be summed up as follows: the case where the *dhari 'ah* (means) can lead in most cases to a *mafsada* (sin), such as selling weapons to a people with whom Muslims are at war, for they might use them to fight Muslims. Another case is selling grapes to a wine merchant, for in this case the sale is a pretext for making the grapes into wine. In other cases still, expediency or *dhari 'a* might lead, often but not always, to sin, such as selling on credit *(bay' al-mu 'ajjal),* which often but not always leads to *riba* or usury.

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161 *Ibn Qayyim, Ilm al Muwagi'in , vol.3,* p. *1350.*

162 Al-Shawkani, *Irshad al Fuhul*, p. *246.*

163 *Usul al Figh Allslami,* by Prof. Mustafa Shalabi, vol.1, p. 316.

The two Imams Ahmad b. Hanbal and Malik, and their followers, upheld the principle of blocking the means, whether there is an apparent intent of sin or not. For if an intent of sin becomes apparent then it should be prevented, and in this case it is an obvious case. If the intent of sin or corruption does not appear, it should still be prevented, because people have become accustomed to it.

As for the two Imams Abu Hanifa and Ash-Shafi'i, they look at the intent, regarding it as good intent so long as it is not indicative of that which is forbidden. If there is an intent towards sin then they prevent the dealings, otherwise they have no objections. Accordingly, they allow credit sale because they view it according to the original intent: which is the permissibility of sale. The affirmed knowledge or inference of the occurrence of a sin is negated, because there is only the possibility of its occurrence or non occurrence. There is no evidence tipping the scales either way, and prohibition is based on either knowledge or suspicion, and it is not fair to blame a person wrongly for a sin which did not intend and which he took every precaution to avoid.[164]

The following examples of *Shari 'ah* show us more clearly what is meant by blocking the means.

1. Allah says: *(And insult not those whom they worship besides Allah lest they insult Allah wrongfully without knowledge.)*[16]

In this verse Allah forbids insulting the idols and gods of the disbelievers because this would be an excuse for insulting Allah Almighty.

2. Allah says in the Munificent Qur'an: *(And let them not stamp their feet so as to reveal what they hide of their adornment.)*[166]

In this verse Allah forbids women to stamp their feet while walking so that men might not hear the sound of their steps and look at them, arousing desire and corruption. This applies to all acts arousing desire among men, such as overdone adornment and perfume when venturing outside the home, even if it is for going to prayers. The Prophet forbade women to use perfume when going to the mosque. He said: "If one of you (females) goes to the mosque she should not use

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164 Ash-Shatibi, Muwafaqat,vol.4, p. 132.
165 *Surah Al An 'am,* 108.
166 ***Surah An-Nur, 31.***

perfume". In another *hadith,* he says: "Do not forbid the women from going to the mosques of Allah, and they should go (without perfume)"

The Legislator thus forbids the means that would most likely lead to sin, but allows those that rarely do so.[167]

3. Allah says: *(0 you who believe! Let your servants and maids, and those among you who have not come to, the age of puberty ask your permission (before they come to your presence) on three occasions: before morning prayer, and while you put off your clothes for the mid-day rest, and after the late-night prayer. These three times are of privacy for you; other than these times there is no sin on you or on them to move about, attending to each other. Thus Allah makes clear the verses (of this Qur 'an), to you. And Allah is All- Knowing, All- wise)* [10]

   In this verse Allah Almighty forbids the servants and maids and those who have not come to the age of puberty from entering without permission during the three periods mentioned. The reason for this is that visiting without permission might be means or *dhari 'a* for them to see that which they should not see, as in those times one might be undressed or dressed casually. At any other time, there would be no such probability, so there is no inconvenience nor limitation to visiting.'

4. Allah says: *(And ask them about the town that was bordering the sea; when they transgressed on the sabbath; as their fish came to them openly on the Sabbath day, and did not come to them on days other than Sabbath. Thus we made a trial of them for they used to rebel against Allah 's Command)*[170]

   Thus it is clear from this verse that Allah Almighty forbade the Jews to fish on the Sabbath. So on the Sabbath they would not go out to fish, but they would block the waterway, saying that they were forbidden to fish on the Sabbath. And Allah described them as having transgressed

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167 Shalaby, *Usul a! Fiqh al Islami,* vol.1, *p.* 314.
168 *Surah An-Nur, 58.*
169 Ibid, 1/315.
170 *Surah AI A 'raf,* 163.

against His Command, and used an expediency to side-track His absolute forbiddance.[171]

5. The Prophet said: "the testimony of adversaries and suspect individuals was unacceptable", and he also prevented the testimony of fathers on behalf of their sons.[172]

6. The Prophet is quoted having said: "One of the greatest sins is for a man to curse his parents". They said: "How can a man curse his parents?" And he answered, "When he curses the father of another person, who in return will curse his father; and he curses the mother of another person who in return will curse his mother".

   So the Prophet equated cursing another man's parents to cursing his own, because the former might be a means to the latter.

7. The Prophet said to Aisha: "Had not your kinfolk just come recently from the state of disbelievers, I would have torn down the House and built it on the foundations of Abraham". Thus we see that the Prophet did not tear down the House and build it anew on the foundations placed by Abraham, despite the great benefit that this would have had, because he did not want to jeopardize the new faith of the Arabs in Allah, so he left the building of the Ka'bah so as to block the means towards the expected end.[173]

8. The Prophet disallowed monopoly, because monopoly is a means that curtail the earnings of the people. Acting on this premise, as monopoly is *haram,* therefore importing in times of want is a duty because it is a means to the well-being of the people.

   Accordingly the Prophet (Pbuh) said: "The person who imports (foodstuff) is blessed".

9. The Prophet forbade a man to buy back what he has given in charity**,** even if it is sold on the market, thereby blocking the means of retracting what he has given in Allah's name. This might be an expediency to defraud a poor man by giving him something in charity then retrieving

171 Shawkani, *Irshad **al Fuhul, p.** 247;* Dar Al Mansur, vol.1, p.500.
172 Shawkani, *Irshad **al Fuhul,*** p.247.
173 Dr. Shalaby, *Usu! al-Fiqh,* vol.1, p. 315.

it by buying it back; and that might also be the condition placed on the charity. [174]

10. The Prophet and his companions forbade the lender to accept gifts from the borrower, for fear that this would lead to *riba* (usury), as the lender might defer the loan in expectation of the gift. This would not apply if lender and borrower were accustomed to exchanging gifts prior to the loan.

    Similarly, a judge, ruler and mediator are forbidden to accept gifts because this is a means to much corruption.

11. The Prophet forbade building mosques on graves and cursed those who did so. He also forbade any aggrandisement of graves and commanded that they be levelled. He forbade prayers to them and at the sites, and also forbade lighting lanterns by their side. All of this was forbidden so as to block the means of worshipping them or taking them as idols.

12. The Prophet (Pbuh) was asked to kill a number of hypocrites for the harm they had caused. He refrained, although this would have put an end to the harm they had wreaked, lest it be construed that Muhammad was killing his companions; and people would reject his message. He said: "I would hate that it be said that Muhammad fought with the help of a people, until Allah Almighty caused him to triumph and then he turned on them and killed them". In another version he is quoted as saying: " I fear that people would say that Muhammad is killing his companions".

13. The Prophet (Pbuh) forbade cutting off the hand of the thieves during battle, lest they flee to the enemy, which would cause great harm.

14. The Prophet (Pbuh) ordered that the children (male and female) should be separated in bed, lest their non-separation might be a means to corruption, knowingly or inadvertently. He said: "Order your children to pray at the age of seven, and beat them if they do not at the age of ten, and separate their sleeping quarters",[175]

174 Shaykh Muhammad Abu Zahra, *Usul al Fiqh, p.* 289.

175 Narrated by Abu Dawud: *Awn al Ma 'bud Sharh Ibn Sunan Abu Dawud,* Dar Al Fikr Publisher, Al Maktaba al Salafiyya, Cairo, vol.2, p. 162.

Eighth Source
Al `Urf (Custom)

'Urf is what people are accustomed to doing or to saying in their everyday life.

An example of verbal *'urf is* the word *walad* in Arabic, which is used to refer only to a male child, whereas it is used in the plural *(awlad)* to mean children, both males and females. [176] *(Allah chargeth you concerning the provision of [awladukum] your children: to the male the equivalent of two females.)*[177] People are not accustomed to using the word *lahm* (meat) to include fish. However, in Arabic the word may be used to indicate fish, Allah Almighty says: *(And He it is Who hath constrained the sea to be of service that ye eat fresh meat from thence.)*[178]

Dabbah (anything that walks) is usually used exclusively to denote four-legged animals, whereas the Arabic language permits this to be said of human beings. The use of the word *talaq* to denote the termination of the bond of marriage [179] (divorce) is another example of verbal *'urf* in terms of speech.

In terms of common practice, *'urf* includes the tradition in most Muslim countries of postponing payment of a woman's deferred dower until either she is divorced or her husband dies. Other examples are: give and take sales, disallowing the *riding* of trains, buses and airplanes unless the fare has been paid in advance and tickets are bought.

Types of *`Urf*

'Urf could be good or bad. For it to be good, it should not contradict the provisions of the Qur'an or the teachings of *Sunnah.* If, however, any contradiction is detected, *'urf* should be immediately abandoned. A case of bad *'urf* could be traced in interest-borrowing where usury is practiced in contradiction with the dictates of the Qur'an. Another case of bad *'urf* practiced

176 Sha'aban, *Usul, 157.*
177 *Surah An-Nisa* , 11.
178 *Surah An Nahl,* 14.
179 Zeidan, al-Wajiz, p. 253.

by many people is when a girl goes out with her fiancée for days or months; this is not permissible, no matter how the period may be short.

Examples of **Good** 'Uri

1- *Al* Istisna' (manufacturing contract), which is a contract for a non-existing thing. However, it is permissible for it has become *'urf.*

2- Hanafite scholars have sanctioned the exchange of gold coins with their equivalent in terms of number and value despite their differences in weight. Ibn 'Abidin explains that people are known to overlook a coin's weight as long as its value does not change. This *'urf* has long been settled in the minds of people, educated or not. Abu Yussufs opinion on this is supportive of this custom and should thus be applied. [180]

3- The use of public baths in return for a sum of money regardless of the amount of water one is likely to use or the time one is likely to spend.

4- Sales of cars, television sets and others, on guarantees. Conditional selling is good *'urf* according to Abu Hanifah,[181] although this type of sale does not conform to the conditions of a valid contract as it combines sale with a condition *(bay' wa* short) which is prescribed by the *Sunnah.*

5- Imam Malik holds that a woman is duty-bound to breastfeed her child unless belonging to a community where breastfeeding is precluded on account of a woman's wealth or lineage. In that case, and on the condition that the child is not averse to taking the breast of a woman other than its mother, and that the father could afford it, a wet nurse should be hired. Otherwise, the woman has to breastfeed her child. Malik has rendered this opinion when he perceived that city people had their wives serve them and breastfeed their children only when the wife belonged to an ordinary family,. but if she belonged originally to a wealthy family or is of a distinguished lineage her husband provided her with people to serve her and with wet nurses to feed her children. Malik's opinion marks a break with the Divine Rule in the Qur'ânic verse where mothers are commanded to breastfeed their children. *(Mothers shall suckle their children.)* He thus maintains that although

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180 *Rasa 'ii Ibn Abidin,* 2/119, excerpted from Sha'aban., *Usul,* 160.
181 Sha'aban, *Usul,* 161.

this is mandatory to other women, it is not so to women of distinguished lineage.[182]

Al Qurtubi explains that according to the dictates of Allah Almighty, "a woman has to breastfeed her child". A husband will provide for her keeping and for her clothing as long as she is married to him. If providing for a wet nurse to feed the child is among the duties of the husband as it would have been cited along with the others. However, Malik alone excluded women of distinguished lineage from this. He has derived a ruling from *a filqh* source and has applied common practice. What is intriguing is that the practice, dating back to the time before Prophethood, has since been sustained. Wealthy men with lineage have been inclined to make it their wives' only job to please them, and thus they would place their infants in the charge of wet nurses. "This is what Malik perceived and what we have verified as legal".[183]

6- Imam Muhammad Ibn Al Hasan has allowed endowments *(waqf)* of movable property if construed as common practice.

7- *Al Mudaraba* is also allowed as a practice common to Arabs since the time of the Prophet (Pbuh.)[184]

Conditions of a Valid *'Uri*

1- The practice should be common as well as frequent.

2- It should be in application when taken as evidence. There could be no incidence of *'urf* if practice is short-lived.[185]

3- It must not contradict a direct injunction [either of the Qur'ân or from *Sunnah]*. Scholars hold that a practice established by *'urf* is the same as one established by a Qur'ânic or *a Sunnah* provision; so establishing by *'urf* is like establishing by (contractual) stipulation.

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182 Sha'aban, *Usul,* p. 162.

183 Al Qurtubi; *Al Jamei Li Ahkam Al Qur 'an,* 3/172-173.

184 Al Zila'i; *Sharh Al Kanz,* excerpted from Dr. Zeidan, al-Wajiz, p. *254.*

185 Al Hamawi; *Al Ashbah,* excerpted from Sha'ban, *Usul, p.158.*

Is 'Uri *a* Valid Proof?

Shaykh Muhammad Abu Zahrah maintains that evidence of the viability of *'urf* lies in the *hadith* :"Whatsoever Muslims perceive as good [practice] is also good with Allah".[186]

However, taking this *hadith* as evidence is weak. Transmitted by Ibn Mas'ud, the *hadith* stands as evidence not for the viability of *'urf* but for *ijma'* (consensus.)[187]

On his part, *Al Qarafi*[188] bases the validity of *'urf* on the Qur'ânic verse: (Keep to forgiveness and enjoin kindness/ custom.)

In truth, 'urf viability is based on other *Shari 'ah* sources such as *ijma', al-masalih al mursalah* (absolute interests), *and adh-Dhara 'i* (blocking the means.)[189]

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186 Abu Zahrah, *Usul Al Fiqh,* p.273.

187 Al Kassani, *Bada'i Al Sana'ei 5/223;* As-Sarkhasi; *Al Mabsout* 12/138, excerpted from Dr. Zeidan, al-Wajiz, p. *254.*

188 Al-Qarafi, *Al Furuq,* 3/149.

189 Zeidan, al-Wajiz, *p.255.*

Ninth Source

Shar'man Qablana

(Previous Legal Systems)

The premises upon which all religions are based through which the Almighty has sought to guide and to set His servants on the right path are the same, if taken in their general purport. *(He hath ordained for you religion which He commended unto Noah and that which We revealed to thee (Muhammad), and that which We commended unto Abraham and Moses and Jesus, saying: Establish the religion and be not divided therein. Dreadful for the idolaters is that which thou callest them. All chooseth for Himself whom he will and guideth unto himself him who turneth (toward Him.) And they were not divided except after the knowledge came unto them, through rivalry among themselves; and had it not been for a Word that had already gone forth from thy Lord for an appointed term, it surely had been judged between them. And those who were made to inherit the Book after them are verily in hopeless doubt concerning*

The verses establish that fountain-springs of all religions are in common. However, the Almighty, for some reason known only to Him, has proscribed for a nation what He has prescribed to others.

So, are the laws of other nations, thus binding on us? To answer this, we must first agree upon a definition of the expression "the Legal Systems of people before us". Let us agree that these are the laws ordained by the Almighty unto other nations before us, for which Prophets and Messengers have been sent to deliver and to put into effect.[191]

Jurisprudents' opinions

There exist four types of rulings:[192]

First: Qur'ânic or *Sunnah* rulings upon which evidence stands that they are just as binding on us as they were to nations and people before us.

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190 *Surah* Ash-Shura, 13-14.

191 Zaidan, *Al Waj 'iz Fi Usul Al Fiqh,* p. *262; Shihab al-Din, Al Moswada Fi Usul Al Fiqh,* p.193.

192 Taffazni, *Al Talwih Ala Al Tawdih,* 2/12.

Jurisprudents agree that these types of rulings are upheld, given the fact that they have been dictated to us in the Qur'ân or *Sunnah.* An example of this is: *(0 ye who believe/ Fasting is prescribed for you as it was prescribed for those before you.)*193

Second: Rulings that God or His Messenger narrated but evidence shows that they were allowed to certain nations before us but abrogated for us. Scholars concede that these practices are rendered illegal or banned.[194] An example of this is the Qur'ânic verse: *(Say: I find not in that which is revealed ought prohibited to an eater that he eats thereof except it be carrion, or blood poured forth, or swine flesh - for that is verily foul...)*195

There is also the *hadith* in which Prophet Muhammad boasts that "to no other nation but to mine were spoils of war made legal".

Third: Rulings included neither[196] in the Qur'ân nor in *Sunnah* and scholars agree that they are not binding on Muslims.

Fourth: Rulings included in the Qur'ân and/or in *Sunnah* where no evidence exists whether or not they remain authoritative for Muslims. An example of this is the following ruling of the Qur'an: *(And We prescribed for them therein* (the law of qisas): *The life for the life, and the eye for the eye and the nose for the nose and the tooth for the tooth, and for wounds retaliation. But whoso forgoeth it (in the way of charity) it shall be expiation for him. Whoso judgeth not by that which Allah hath revealed: such are wrong-doers.)*

On the viability of such rulings, Muslim scholars have been known to disagree. Most, including Hanafite, Shafi'ite, Malikite and Hanbalte scholars maintain [197] that they apply to Muslims since the Almighty has mentioned them in the Qur'ân. Otherwise, why are we so informed?

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193 *Surah Al Bagarah,.182.*

194 *Al Wajiz Fi Usul Al Fiqh,* p. *264; Shihab al-Din, Al Moswada Fi Usul Al Fiqh,* p.194.

195 *Surah Al An'am,* 145.

196 *Surah Al Ma'idah, 45.*

197 Zaidan, *Al Wajiz Fi Usul Al Fiqh, p.264; Shihab al-Din, Al Moswada Fl Usul Al Fiqh,* p. *194; Taftazani, Al Talwih Ala Al Tawdih* 2/13; *Amidi, Al Ihkam Fi Usul Al Ahkam,* 5/161; Shaykh Khallaf, *llm Usul* al-Fiqh, p. *94.*

Mu'tazila and Ash'ari scholars, on the other hand, hold that these rulings are not applicable but have no argument to prove their point.

In conclusion, it would be safe to say that all jurisprudents agree on the validity of the laws of people before us as a source of our *Shari 'ah,* unless revoked by Qur'ân or *Sunnah;* and such instances are few.

Tenth Source

Qawlus-Sahabi
(Sayings of the Prophet's Companions)

Another source of Islamic law is the opinion or the saying of the Prophet's Companions as given by the Muslim jurisprudents. But who could be defined as a Companion? Would his opinion be valid? And under what circumstances?

A Companion is defined as the one who saw the Prophet (Pbuh), believed, supported and listened to him and accompanied him for a period of time deemed enough to merit the appellation. Examples are the Four Caliphs, Abdullah Ibn Abbas, Abdullah Ibn Mas'ud, Alias, and Hudhayfa, among others (May Allah be satisfied with them all.)[198]

To the *ulema'* of *hadith,* a Companion is the one who saw the Prophet, believed in and accompanied him for a period of time, be it long or short. Accordingly a Companion could be anyone who incidentally met the Prophet even if it was for one moment.

After the Prophet's death (Pbuh), his Companions played their part to the best of their ability. Some of them were responsible for pronouncements of *fatwa* and others for adjudication; others fought so that Islam would spread across the globe. They are known to have given their rulings on numerous occasions. The question is could these rulings be considered another source of *Shari'ah* besides the Qur'ân, the *Sunnah* and *ijma'.* On this point, jurisprudents have differed.

1) A companion's opinion is a proof in matters which could not be settled by an independent legal opinion *(ijtihad);* the opinion is, thus, deemed traced to the Prophet (Pbuh) whose *Sunnah* is a fundamental source of law-making.[199] An example provided by *Hanafi* scholars is the saying of Abdullah Ibn Mas'ud that: "The least of a woman's menstruation period is three days"; it is also established that "the least a man must pay dower are ten dirhams". An example is also given by the statement

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198 *Sharh Musallam Al Thubut,* 2/186; *Tajtazani, Al Talwih wal Tawdih,* 2/17; *Zeidan,* Al-Wajiz, p. *260.*

199 Sa'aban, *Usul,* p.174.

of Aisha', that "the maximum period of gestation is two years, with no increase even by the measure of a spindle's single round".

2) A Companion's opinion upon which the other Companions agree is considered *hujja* (proof) and it is a case of *ijma'.* An opinion, which was not countered by other companions, is a proof in *Shari* matters since it is deemed a case of silent *ijma'.*

3) A Companion's opinion does not provide a proof against other companions. For companions are known to have differed amongst themselves, with each maintaining an opinion of his own.

4) But could a Companion's opinion reached by way of *ijtihad* be deemed *hujja?*

   a) Some (Group A) have held that it could not be so; that a Companion's opinion so reached cannot be binding on others; and that legal evidence must ' be traced and given by the companion concerned.

   b) Others (Group B) hold that it is viable as *hujja* in matters where no evidence from the Qur'an, from *Sunnah* or from *ijma is* available. In the event of disagreement, it is important that we should know how to be selective from among the Companions' opinions.

Group (B) scholars believe that the possibility of a Companion who accompanied the Prophet and who understood the rationale of Law-making being in the wrong is very remote. On the other hand, Group (A) scholars contend that we are commanded to follow only the dictates of the Qur'ân, of *Sunnah* and of *ijma'.*

Eleventh Source
Al Istishab (Presumption of Continuity)

In Arabic, the term *istishab* means to request accompaniment and maintain a status. To legal theorists, it denotes maintaining as established that which is proved to be so, and dismissing that which is not. What is known to exist is thus ruled present according to *istishab.* A property proved owned by someone is his until proven otherwise; he who is known to be alive cannot be ruled dead without evidence; a missing person cannot be ruled dead; or a married person divorced without evidence.[200]

Although a source of *Shari 'ah,* or an evidence thereof, *istishab* should be the last to which a scholar goes except as a last resort. Accordingly, to Al Khowarezmi, *istishab* is the last resort for *fatwa* (verdict.) A mufti, asked to rule in a case must first consult the Qur'ân, *Sunnah, ijma'* and then *qiyas.* If a ruling could not be found in any of these, then *istishab* must be applied whether in establishing the incident or in denying it. A mufti uncertain about an incident being absent, must rule it is present, and if he doubts its being present, he must rule it is absent.[201]

There exist two evidences to *istishab:*

First: *Shari 'oh,* where it is deduced that rulings remain valid as long as there is nothing to suggest otherwise.

Second: Reason: no *fatwa* may be given for killing a person on account of apostasy unless that person is proven an apostate. Essentially, Muslim blood is inviolable.

According to scholars, *istishab* is divided into four types:

- Presumption of original absence: as in the case of a person being legally incompetent until proven otherwise, e.g. a youngster until grown up. Only when a man is proved married can marital rights and obligations be imposed upon both himself and his wife.
- Presumption of continuity of attribute: He who is proved alive, though actually missing, remains alive until proven otherwise; he who is a guarantor to someone in debt remains so until he or the debtor pays the sum they owe.

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[200] Shawkani ***Irshad Al Fahul***, p. ***280.***
[201] Shaykh Abu Zahra; ***Usul** Al Figh,* ***p. 296.***

Shari 'ah or reason-oriented evidence: a man in debt remains so until he pays the debt or is absolved. This is knowing as presumption of original presence.

- Presumption of the continuity of ruling: a judgment passed whereby a thing is rendered available or unavailable remains unchanged until evidence is provided to the contrary. Fundamentally, everything with the exception of *ibda'* (relations among members of the opposite sex), is permissible. This is established in the verse ***(He is the One who has created for you whatever is in the earth altogether)***[202] and in the verse: ***(And hath made of service unto you whatsoever is in the heavens and whatsoever is in the earth, it is all from Him. Lo! Herein verily are portents for people to reflect.)***[203]

It is to be noted here how Shaykh Abu Zahra has defined *istishab.* He explains it as "applying evidence that exists, and consecrating laws that are established and that have remained unaltered".[204]

From *istishab* several rules have been derived:

- Nothing that has been established with certitude could be disestablished unless by compelling evidence.
- Nothing that is allowed could be disallowed unless by evidence which, either contradicts the allowing, or which changes the status of the thing allowed.
- Anything that is not subject to evidence from *Shari 'ah* remains as fundamentally ruled.

There also exist principles in the penal code and in civil law, which are based on *istishab.* Examples: (a man is innocent until proven guilty), a "contract is *binding* to the signatories", the latter principle is premised, *according* to Ibn Hanbal, *on* the tenet of fundamental permissibility.[205]

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202 *Surah Al Baqara, 29.*

203 *Surah Al-Jathiyah,* 13.

204 Abu Zahrah**,** *Usul Al Fiqh,* p. *303;* Zeidan, al-Wajiz, p. 370.

205 Shaykh *Abu* Zahra; *Usul AI Fiqh,* Dar Al Fikr, p. 705.

Chapter II

PHILOSOPHY OF LEGISLATION IN ISLAM

(In the introduction we discussed the definition of Islamic Legislation in both the Arabic language and in *Shari 'ah.* In Chapter One, we probed the sources of Islamic Legislation, and now we come to Chapter Two where we shall study the philosophy of Islamic Legislation.)

PHILOSOPHY[206] OF LEGISLATION IN ISLAM

We have said before that the Islamic *Shari'ah is* intended for the well-being of the people; to preserve them and lead them to the path of righteousness. In this respect Ash-Shatbi (May Allah be merciful on him) says, "The laying down of *Shari'ah is* for the benefit of the worshippers, both in this life and the hereafter".[207]

The legal theorists had varying opinions regarding the justification *(ta'lil)* for the rules *(ahkam)* ordained by Allah Almighty for His servants, which can be summed up as follows:

1- Some legal theorists justified those rules as intended to preserve the interests of the people. Those who prescribed to this idea were the followers of Al-Mutazilah and Al-Maturidiyyah and some Hanbalites and Malikites. However, the interests of the servants do not restrict the will of Allah Almighty.

2- Ar-Razi was of the opinion that neither the rulings nor the acts of Allah are subject to any justification whatsoever.[208] This is the opinion of the Zhahiriyyah and Al- Asha'irah.

We agree with the first opinion, and we have referred to the opinion of Ibn al-Qayyim, who said that Allah's *Shari'ah* was all benefit and all wisdom. We are also inclined towards the opinion of Al-`Izz Ibn Abdul *Salam* who said that *Shari'ah is* all benefit for it aims at either warding off wrongdoing

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206 What is meant by the word (philosophy) in this context is "wisdom", as the great thinkers are unanimously agreed that philosophy means (love of wisdom.) They attribute this appellation to Pythagorus, the famous Greek mathematician and philosopher, who came before Socrates and Plato. It is said that he was not satisfied with the word (wise), nor with the word (wisdom) and chose instead the expression (love of wisdom.)
See: *Islam and the Philosophy of Civilization.* Dr. Hussein Fawzy An-Najjar, Dar al Taawun Priming and Publishing Establishment, Cairo 1413W 1993, p. *39.* Al-Shatibi, *Al Muwafaqat,2/6.*

207 Shatibi, *Al-Muwafaqat, 216* and Shaykh Abu Zahra, *Usul AI-Filth, p.369.*

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(mafasid) or bringing benefits (masalih)[209] . Having opted for the first opinion we would like to add that Allah Almighty is not obligated to reveal the benefits of every matter which He ordains, for as He says: *(He cannot be questioned as to what He does, while they will be questioned.)*[2i0] Allah Almighty has pointed out the purpose of *Shari 'ah* on many occasions. He has pointed out the purpose of *sending* Messengers when He says: *(in order that mankind should have no plea against Allah after the (coming of) Messengers.)*[211] In another instance He points out the purpose of sending the Prophet Muhammad (Pbuh): (And We have sent you (0 Muhammad) not but as a mercy for the `Alamin [mankind, jinn and all that exists].)[212] On the origin of Creation, Allah says: *(And He it is Who has created the heavens and the earth in six days and His Throne was on the water, that He might try you, which of you is the best in deeds)*[213]. And I (Allah) created not the jinn and mankind except that they should worship Me [214](Alone) *and* (Who has created death and life that He may test you, which of you is best in deed.)[215]

Thus, we see that justification for Allah's Commands abound in the Qur'an and the *Sunnah,* as Ash-Shatbi said.[216]

In general, the Shari 'ah was ordained to realize the following benefits:

1- To preserve religion.
2- To preserve the soul.
3- To preserve the mind.
4- To preserve procreation.
5- To preserve wealth.

Imam Al-Ghazali said: "All that which preserves these five fundamentals is a benefit *(maslaha),* and all that which forfeits these fundamentals is a wrongdoing *(mafsada),* and warding it off is also a benefit". He added,

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209 See Chapter One of this study, pp. *53-54.*
210 *Surah Al-Anbiya, 23. .*
211 *Surah An-Nissa,* 165.
212 *Surah Al Anbiya*, 107.
213 *Surah Hud 7.*
214 *Surah Adh-Dhariyat, 56.*
215 *Surat Al Mulk, 2.*
216 Shatibi, *Al Muwafagat, 217.*

"Preserving these fundamentals is a necessity, the highest ranking of all benefits" [217]

Side-by-side with the necessities come needs and improvements; and all *Shari 'ah* rulings fall under one or the other of these three categories. It is doubtless that a study of the purpose of all matters dealt with in Islamic *Shari 'ah* would require volumes. It is sufficient, therefore, to sum it up in a few words, *which* highlight Islamic *Shari 'ah* as a legal code that brings all that is good and beneficial, and prohibits all that is ugly and harmful.

In the following pages, we shall try to identify some of the aspects of Islamic *Shari 'ah* and its philosophy and goals regarding the following matters:

1- Universality *(Alamiyyah)*

Muslims should be proud of the wonderful principles laid down by our Islamic *Shari 'ah,* among which is its generality. For it is applicable to all people and not to the Arabs alone, or to the non-Arabs alone.

This is supported by the following quotations from the Qur'an: *(And We have sent you (0 Muhammad) not but as a mercy for the Alamin* (mankind, jinn and all that exists) [218] and *(Blessed is He who sent down the criterion (of right and wrong i.e. this Qur'an) to His servant (Muhammad) that he may be a warmer to the Alamin)*[219] and *(And We have not sent you (0 Muhammad) except as a giver of glad tidings and a warmer to all mankind.)*[220]. This last verse indicates that the Prophet Muhammad (Pbuh) came as a mercy to all mankind. Said Ibn-Jubayr quoted Ibn-Abbas as saying that Muhammad (Pbuh) was a mercy to all mankind; those who believe in him and are sincere find joy, and those who do not believe in him are saved from that which befell nations *which* were either destroyed or drowned.[221]

In his explanation of the text: (that he may be a warner to the Alamin), Al-Qurtubi says that what is meant by Alamin is mankind and jinn, because the Prophet (Pbuh) was a Messenger and a warner to both, and because he was the last of the Prophets. Only he and Noah (Nuh) had a message addressed to all

217 Ghazali, *Al Mustasfa,* 1/287-288 and Shaykh Abu Zahran, *Usul,* p.269.
218 *Surah Al Anbiya,* 107.
219 *Surah Al Furgan, 1.*
220 *Surah Saba. 28.*
221 Al Qurtubi, 11/ 350.

mankind, as Nuh's message was addressed to all mankind who survived the great storm, because it was they who replenished the earth[222]. The same verse indicates the general and all-encompassing nature of the Message of Prophet Muhammad (Pbuh.) Al-Zajjaj interpreted it as saying that (We have not sent you except to bring together all people, as regards both the warning and the *tidings.)*[223]

The universal character of the message addressed to the Prophet Muhammad is confirmed by the following verses: ***(Say [O Muhammad] "O mankind! Verily, I am sent to you all as the Messenger of Allah – to Whom belongs the dominion of the heavens and the earth. There is no God but He. It is He Who gives life and causes death. So believe in Allah and His Messenger, the Prophet who can neither read nor write, who believes in Allah and His Words, and follow him so that you may be guided.)***[224]" In his explanation of this verse, Imam At-Tabari says that Allah Almighty tells His Prophet, Muhammad, to address the message to all people, and to tell them that he is sent to them all as the Messenger of Allah. That means that he was not sent to some and not to others, as were some of the other prophets preceding him, and that his message was addressed to all mankind[225].

Jabir quoted the Prophet (Pbuh) as saying: "I have been granted five privileges which were not granted to anyone else before me: I was caused to triumph through awe for the march of an entire month; the entire land has been ordained as a cleansed mosque (prayer place) for me, for any man from my *ummah* can pray wherever he may be, when the call for prayer comes; I have .been allowed to partake of the ' spoils of war, whereas no one before me was allowed this; I have been granted the right of intercession; the Prophets that came before me were sent to a certain people whereas I have been sent to all people".[226]

Because of this universality, Muslims all over the world feel that they are brethren, regardless of country or language. The Prophet (Pbuh) said in this context, "Do not envy one another, and do not defile one another and do not

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222 Ibid, Tafsir al-Qurtubi,13/ 2.
223 Ibid,. 14/300.
224 *Surah Al A* 'raf,158.
225 *Tafsir Al Tabary, 9/86.*
226 Narrated by the two Shaykhs, *Sahih Muslim,* 1/307, Chapter on the Masjids and Prayer Sites.

loathe one another, and do not contend with one another, not any of you may raise by false bidding ***(najash)*** the sale price of a commodity to another, but be Allah's worshippers as brethern; one Muslim is the brother of the other Muslim: he should not oppress him nor forsake him, nor lie to him nor humiliate him. Piety is here — (and here the Prophet pointed to his chest three times.) Sufficient unto man is the evil thereof when he humiliates his Muslim brother. The blood, property and honour of the Muslim is forbidden ***(haram)*** to other Muslims".[227]

This meaning is confirmed by the Prophet (Pbuh) when he says, "Not one of you will be a believer, until he loves for his brother what he loves for himself".[228] What a magnificent principle is this which makes a person wish for his brother that which he himself possesses; it is a sublime principle to deny faith to those who do not practice love and compassion for others. Indeed, only the wonderful *Shari ah* ordained by Allah can come up with such a principle: *(Had it been from other than Allah, they would surely have found therein many a contradiction.)*[229]

A Muslim may travel far and wide, but he will always find a brother Muslim to give him succour, and to offer him love and friendship and a shared faith. They are brought together by Allah's *Shari ah.* As the Prophet Muhammad (Pbuh) puts it: "A believer as regards another believer is like a building, each part supports the other".[230]

2- Justice *(Al -`Ad!)*

Allah created the heaven and the earth in the name of justice. He Commanded His creatures to live by it and He urged them to adopt it. Allah Almighty says: ***(0 you who believe! Stand out firmly for justice, as witnesses to Allah, even though it may be against yourselves, or your parents, or your kin, be he rich or poor, Allah is a better Protector. So follow not the lusts (of your hearts), lest you avoid justice; and if you distort your testimony or refuse to give it, verily, Allah is Ever Well Acquainted with what you do.)***[231]

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227 Narrated by Muslim.

228 Narrated by Bukhari and Muslim.

229 *Surah an-Nisa, 82.*

230 *Musnid of* Imam Ahmad Ibn Hanbal, vol.4 /409. *Surat*

231 *An- Nisa, 135.*

Thus we see that Allah asks His worshippers to "stand out firmly" for justice and to be perseverant and diligent in adherence to it in all matters,[232] even if they have to bear witness against themselves or their parents or their kin. Even if the person testified against is rich and will shower them with his riches, or if he is poor, they should not withhold or alter their testimony for a certain benefit.

These are heavenly teachings, which all Muslims should diligently practice. In his explanation of this text, At-Tabary says: "that Allah is urging man to bear witness, be it against himself or his parents, or his kin or against the nobles from among his people. This is because the testimony is for Allah and not for the people, and Allah has approved justice for Himself. Justice is Allah's balance on earth. Through justice Allah restrains the strong versus the weak, and the liar versus the honest, and the wrongdoer versus the righteous. Also with justice Allah upholds the honest, and shows the liar for what he is, and repels the aggressor.[233]

On another occasion Allah says: *(Verily, Allah enjoins justice and the doing of good and giving help to kith and kin, and forbids all evil deeds, abominations and rebellion. He admonishes you, that you may take heed.)*[234]

The *'ulema* say that the justice referred to in this context denotes equity and fairness, and from these comes acknowledgement by mankind of Allah's blessings, and gratitude for His kindness. It is mentioned that Ibn ' Uyaynah interpreted this verse by saying that the justice mentioned means purging of one's thoughts and deeds from all that is offensive in the sight of Allah. The term doing of good *(ihsan)* means that man's thoughts should be better *(ahsan)* than his deeds, and the terms evil deeds *(al fahsha'a)* and all that which is prohibited by Islamic law *(al-munkar)* mean that the deeds are better than the thoughts behind them.[235]

Whatever the views of the *'Ulama* regarding the qualification of justice it still retains its generality, comprehensiveness and beauty: the justice of a Muslim towards himself, towards his spouse and kinsfolk, and towards those over whom he has control.

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232 Al-Alusi, *Tafsir Ruh Al Ma 'ani,* 5/167.
233 Tabari, *Jami Al Bayan Fi Tafsir Al Qur'an, 4/206.*
234 *Surah An-Nahl, 90.*
235 *Tafsir Al Tabary, 14/162-163,* Dar al Fikr edn, vol. 14, pp. *162-63.*

In his comment on this verse, At-Tabari says: "Allah commands those of you who are in charge of the affairs of other Muslims to discharge that which your subjects placed in your trust regarding their rights, wealth and revenues, in accordance with Allah's commands and in the manner which He prescribed, and pay those who are entitled to it. Do not oppress them, do not take possession of what belongs to them, do not place something in other than its rightful place, and do not take it before permission is granted to you. Allah commands that if you pass judgments among your people that they be meted out with justice and fairness. This is Allah's commands which He revealed in the Qur'an, and which He made known through His Prophet. Do not exceed that lest you commit an injustice towards them.[236]"

The heavenly messages sent by Allah pursue many lofty goals, one of which is the prevalence of justice among people. In this respect, Allah says, ***(Indeed We have sent Our Messengers with clear proofs, and revealed with them the Book and the Balance that mankind may uphold justice. And We brought forth iron wherein is mighty power, as well as many benefits for mankind, that Allah may test who it is that will help Him and His Messengers in the unseen. Verily, Allah is All-Strong, All-Mighty.)***[237]

What is meant by "the Book" is the heavenly books revealed by Allah Almighty to His Prophets and Messengers to guide them in this world and the next. What is meant by the balance is justice in word and deed.

The parallel between justice and the balance is mentioned in another verse which says: ***(And the heaven: He has raised it high, and He has set up the balance. In order that you may not transgress (due) balance. And observe the weight with equity and do not make the balance deficient.)*** *8* Thus Allah Almighty mentions that He has ruled justly between people in word and deed. The balance referred to is not restricted to the scale, but it includes the scales and measures used by people to weigh and measure. All this should be done with great accuracy and balance.[239]

Allah Almighty says: ***(Verily! Allah commands that you should render back the trusts to those to whom they are due; and that when you judge***

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236 *Al Tabari, Tafsir al-Tabari, 8/498.*

237 *Surah Al Hadid, 25.*

238 *Surah Al Rahman, 7-9*

239 Shaykh Abdel Rahman Ibn Nasser Al Saadi, *Tafsir Al Karim Ar-Rahman Fi Tafsir Kalam Al Mana 'n, 7/ 245.*

between men, you judge with justice. How excellent is the teaching which He gives you! Truly, Allah is All- Hearer, All- Seer.)[240] Whatever is said about the reason for the revelation of this verse, it is clear that it is addressed to all people. The trusts include the rights, which they are entrusted with, which are the rights of Allah and the rights of His servants, whether in word or deed or faith. Many have said that this verse is addressed mainly to the rulers, urging them to oversee their subjects, that they might abide by the principles of Islam and its *Shari 'ah.* They also said that it entails placing in the key positions those who are worthy of these positions.[241]

Allah Almighty says, *(And come not near to the orphan 's property, except to improve it, until he attains the age of full strength; and give full measure and full weight with justice. We burden not any person, but that which he can bear. And whenever you give your word, say the truth, even if a relative is concerned, and fulfil the Covenant of Allah. This He commands you, that you may remember.)*[242] This verse comprises a number of commands and rulings such as: preserving the property of the orphan and improving upon it until he is strong enough and then handing it over to him. It also urges people to observe the weights and measures carefully, and to be as fair and as just as they can possibly be. Moreover, it affirms what was previously said about being just in word and in everything else.

Al-Qurtubi says that Allah Almighty is aware that many of His worshippers are loath to see that others enjoy that which is not in fulfillment of the Giver's Command of giving each person his due. He does not ordain him to do more than he is able to do, because this would cause him to anguish. Allah Commands the person who has a right to take what is rightfully his and not to settle for less, which would vex him. Malik says, as narrated by Yahya Ibn Said, that he was told by Abdullah Ibn Abbas that he said: Not once did usurpation prevail amongst a people but that Allah filled their hearts with fear, nor did adultery become rampant, but that the death toll amongst them increased; and not once did a people shortchange others in weights and measures, but that their earnings were curtailed; and not once did a people rule

240 Surah An-Nissa, 58
241 Al-Alusi, Tafsir Ruh Al Ma’ani, 5/63-64
242 Surah Al An’am, 152

unjustly, but that **bloodshed** became widespread; **and** not once **did a** people impugn the Covenant, but that Allah set their enemies against them".[243]

This emphasis on the establishment and prevalence of justice is not alien to Allah. For justice is the foundation of the universe, and is the basis of stability in all societies. Doubtless we find that societies in which there is no justice, have no stability or security, and their tribunals are replete with various lawsuits.

Allah has commanded certain individuals and all peoples to observe justice, and the Prophet **(Pbuh)** himself was commanded to observe justice, as Allah says, *(So unto this (religion of Islam alone and this Qur 'an) then invite (people 0 Muhammad) and stand firm as you are commanded, and follow not their desires but say: '7 believe in whatsoever Allah has sent down of the Book (all the holy* ***Books) and*** *I am* ***commanded*** *to do* ***justice*** *among you.* ***Allah*** *is* ***our*** *Lord and your Lord. For us our deeds and for you your deeds. There is no dispute between us and you. Allah will assemble us, and to Him is the final return)"* [244]

There are differing views as to what is meant by justice in this context. Ibn Abbas and Abul ' Aliyah say it means: "I will treat you equally in faith by believing in all the books and all the prophets". Others say it means: "I will do justice in all cases". Some say: "This is intended as justice in rulings, and some say in conveying the Message".[245]

I say, despite the different interpretations, justice remains in accordance with Islamic *Shari 'ah*, all encompassing, general and comprehensive.

The Prophet Muhammad **(Pbuh)** was the epitome of justice, the supreme example and role model in all matters and on all occasions. *(Indeed in the Messenger of Allah you have a good example to follow for him who hopes for (meeting with) Allah and the Last Day, and remembers Allah much.)*[246]

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243 Al-Qurtubi, *Jami ' li Ahkam Al Qur 'an, Mu 'assasah* Manahel Al `Erfan, Beirut, 7/136.

244 *Surah ash-Shura*, 15.

245 Al Qurtubi, 16/ 13.

246 *Surah Al Ahzab, 21.*

The Prophet Muhammad (Pbuh) was just in all matters. He was just with his family with his companions, and even with his enemies. He is quoted as saying, "He who has two wives and is partial to one of them will rise with half of him inclined on the Day of Judgment".[247]

He (Pbuh) was the ultimate example in all matters and he is the perfect role model. It is said that a roaming Arab came to him asking for charity. And when the Prophet (Pbuh) had given him, he asked him, " Have I done well to you? And the man answered: "No". The Muslims were angered and set forth to attack him but the Prophet gestured unto them to let him go. Then the Prophet got up and entered his house, and he sent for the man and gave him more. Then he asked him, "Have I done well to you?" And the man said: "Yes, and may Allah reward you and your family and kin". Then the Prophet said: "You have said what you have said, but my companions have bad feelings towards you, so if you so desire go to the men and say what you have told me, that their hearts may be cleared of their bad feelings towards you". The man said, "Yes". The next day, the Prophet said: "This man said what he said and we increased what we gave him and he claimed that he was satisfied, is that so"? And he said: "Yes and may Allah reward you and your family and kin". Then the Prophet said: "This story is like that of a man who had a camel which went astray. The people followed it but it only strayed farther". Then the owner called unto them and said, "Leave me to my camel, for I am more compassionate towards it and I know it better than you do". Then he went towards it with some sweepings from the ground. So it came to him and knelt down and he mounted it and went on his way. So if I had left you with what that man had said, you would have killed him and he would have gone to hell.[248]

This story is a proof of his justice as well as his patience (Pbuh.)

Abdullah Ibn Sallam narrated the story as to how Zayd Ibn Su'nah the Jewish scholar converted to Islam. Abdullah Ibn Su'nah said: All possible signs of Prophethood I discerned when I looked upon the face of Muhammad, with the exception of two characteristics: his patience supercedes his irrational behavior, and the more irrational the behavior towards him the more patient he becomes. I wanted to be friendly towards him so that by being better acquainted with him, I would know about his irrationality and his patience. One day I bought from him dates by forward sale and I gave him the price. Then

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[247] *Awn Al Ma 'bud, Sharh Sunan Abu Dawud,* Dar al Fikr, Beirut, Lebanon, 6/171. Khurofa,
[248] *Nazarat Fil Islam,* p. 193, quoted from *Nur a! Yaqin,* p. *290. 90*

two or three days before the due date, I came to him and clutched his clothes in my hand and looked at him angrily and said: "Will you not give me my due 0 Muhammad? By God, all sons of Abdul Muttalib are procrastinators". And `Umar said, "What enemy of Allah would say to the Messenger of Allah what I have just heard? By Allah, were I not wary of your strength, I would have struck off your head with my sword". And the Messenger of Allah looked at `Umar in silence and amity. Then he smiled and said, "He and I were in need of more than this from you 0 `Umar: that you should order me to repay well, and that you should order him to present his case well. Go with him `Umar and give him his due and twenty measures more for the fear you have caused him". And `Umar did so, and I said: "0 `Umar, all traits of Prophethood I have seen upon the face of Muhammad when I looked upon him except for two which I did not find". And he mentioned them, and then said, "I testify that I have accepted Allah as my God, and Islam as my religion and Muhammad as my Prophet".[249]

On one occasion, the Prophet (Pbuh) brought necklaces made of gold and silver and divided them among his friends as Allah had ordered. Then came a roaming tribesman who said, "0 Muhammad! Wherein Allah has ordered you to divide fairly, but I see that you have not been fair". Then the Prophet said, "Woe be unto you, who then can be more fair to you than I am?" Then when the man was gone, Muhammad said, "Bring him towards me gently;" and he forgave him.

The Prophet's Companions followed his example, and later on became the symbols and role models of all that is good and just. The stories narrated about them are the pride of Muslim history.

It is said that `Umar leased a horse and put it to good use. After a time the horse fell sick, and `Umar wanted to return it to its owner. The man refused to take it back after it became sick from carrying heavy loads. Then the just Caliph told the man: "Let there be an arbitrator between us". At the time, Shurayh was present at the meeting, and said: "You are not in the right, 0 `Umar. You have received a healthy horse, so you should return it in the same state". The Caliph was not angered by this ruling against him, and did not reprimand Shurayh. Instead, `Umar the Just said: "This is a fair sentence, and you would make a good judge. Go! I have appointed you judge over Kufah".[250]

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[249] Ibid, p. 196 quoted from *Al Islam:* by Hamed Abdel Kader, p. 249.
[250] Heikal, Dr. Muhammad Hussein, *Al Faruq 'Umar,* Cairo, Matba'ah Misr, 1364H, vol.2, p.225.

History tells us that Shuarayh was one of the best judges in the history of Islam. He became known for his intelligence and his fair and bold sentences. Thus, justice is the raison d'etre for the establishment of the pillars of nations and individuals. Therefore, it stands to reason that it should be one of the pillars of Islamic *Shari 'ah.*

3. Graduality

The philosophy of Islamic legislation rests, inter alia, on the fact that 'Allah Almighty has adopted a step-by-step approach in ordaining His laws, thus making it easy for people to follow and abide by them. Allah Almighty, the Most Exalted, Most Merciful and Most Compassionate is even more so to His creatures than a mother to her new-born baby. Therefore, initially, He ordained prayer as *fard* (obligatory ritual) to be performed twice a day; once in the morning and the other in the evening. Once Muslims have been accustomed to such practice, prayer was ordained to be performed five times per day and night two *rak 'ahs* (units) each except the sunset prayer. It was then established in this number during travel and was later increased for urban residents to four *rak 'ahs* for each of the noon, afternoon and night prayers.

As regards *zakah* (legal alms), it was first enjoined as any portion that a Muslim could afford without any definition as Allah Almighty says in the Qur'an: *(They ask thee how much they have to spend; say: 'W hat is not beyond your needs,')* that is, whatever one can afford without any definition. Rates of *zakah* were later defined according to types of property: one tenth, half or quarter of a tenth as the case may be.[251]

Similarly, several other laws have been introduced on a step-by-step basis as mentioned before. As an example we quoted the story of the prohibition of wine *(khamr.)* Before the advent of Islam, the Prophet's Companions, following pre-Islamic customs, used to drink wine and even make it at home. To this effect, in his book Al-Musnad, Abu-Dawud relates, reporting Ibn `Umar that three verses of the Qur'an were revealed regarding wine, the first was: *(They ask thee about intoxicating liquors and games of chance. Say: in both of them is great sin and some advantages for men and therein is greater sin than their advantage.)*[252] When *khamr* was forbidden,

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[251] Muhammad Mustafa Shalabi, *Al Madkhal fi al Fiqh a! Islami* (Introduction to Islamic Jurisprudence) 10'h ed. 1405 H/1985, p. *78. Surah a! Baqqara, 219.*

someone reportedly said to the Prophet, "0 Messenger of Allah Almighty let us benefit with its advantages as Allah Almighty said," upon which the Prophet did not comment. Thereafter, the following verse was revealed: (0 you who believe! Do not go near prayer while you are intoxicated until you know what you say.)[253] When *khamr* was categorically forbidden, some people were reported to have said to the Prophet, "We do not drink it shortly before prayer time," upon which the Prophet also kept silent. Finally, the following verse was revealed: *(0 you who believe! Intoxicants and gambling, (dedication of) stones and (divination by) arrows are an abomination of Satan 's handiwork. Shun such (abomination) so that you might prosper. Satan 's plan is to excite enmity and hatred between you, with intoxicants and gambling and bar you from the remembrance of Allah and from prayer: Will you not abstain!)* [254] *Hereupon, the Messenger of Allah* (Pbuh) said, "(Now) *khamr is* forbidden". [255]

In line with the principle of graduality, there is another principle, i.e., that of brevity and detail *(al-ijmal wa'l-tafsil),* which can be seen clearly from a comparison between Makkan and Madinite legislation with the former being rich with overall principles and generalizations and the latter with particular details.[256]

However, graduality does not mean shelving Islamic law in its entirety under the pretext that Allah Almighty had originally adopted this step-by-step approach in legislation. It is understood that Muslims, rulers and subjects, are required to implement Islam. Should in certain countries, particularly where a majority of non-Muslims live, there be serious obstacles and barriers to this end, rulers have their excuse in delaying the application of certain provisions. However, in countries with an overwhelming majority of Muslims, they will be accountable for applying the Law of Allah Almighty. Should they fail to do so, they will have a hard reckoning by Allah Almighty. In this case, they will be subject to the words of Allah Almighty in the Qur'an: *(Those who fail to judge by what Allah hath revealed are (no better than) unbelievers.* [257] *(Those who*

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[253] *Surah An-Nissa '*, 43.
[254] *Surah Al- Mai 'da*, 90-91.
[255] Shawkani, *Na yl al Awtar*, 8/141; Shaykh Shalabi, al-Madkhal, p. 79.
[256] Shaykh Muhammad al Khodari, *Tarikh at-Tashr'i a! Islami* (History of Islamic Legislation), Matba'ah Dar Ihya al-Kutub al-'Arabiyyah, Cairo, 1339 H/1920, pp. 20-21.
[257] *Surah Al Ma 'ida, 44.*

fail to judge by (the light of) what Allah hath revealed are wrong-doers.)[258] *(Those who fail to judge by what Allah hath revealed are (no better than) those who rebel.)*[259]

Explaining the step-by-step approach in legislation, Imam Ash-Shatibi says, "Hence came the gradual revelation of the Qur'an over twenty years where obligatory provisions were revealed one by one rather than all at one time in order to avoid people shunning them all at once. "It was reported that Abdul-Malik son of `Umar Ibn Abdul-Aziz said to his father, "Why don't you apply laws (strictly)? I don't care if even pots would boil with you and me for the sake of right". "Son," replied `Umar, "don't be in a hurry, for Allah Almighty denounced wine twice in the Qur'an and prohibited it the third time. I'm afraid if I coerce people to do the right all at once, they will recoil all at once, which may be cause for sedition".

Ash-Shatibi further says: "This is a correct and credible argument in plain inference; as some (provisions) were revealed in the public interest, by way of familiarization. Most of them, being based on particular incidents, were more acceptable to people. As these provisions were revealed one by one; bit by bit, people became gradually accustomed and familiarized with them. No provision was revealed until the preceding one has been a regular and familiar habit to a person under obligation *(mukallaf)* who had never before been aware of such obligation. When the second provision was revealed, people were more ready to abide by it and such will be the case with the third and fourth".[260]

Since that time, which was closer to the age of Prophethood and conclusion of Islamic legislation, the pious Caliph `Umar Ibn Abdul- Aziz (May Allah be satisfied with him) used to pause and reflect over applying the provisions of Islam and adopted a gradual approach in this respect. It was reported that his son Abdul-Malik said to him, "0 Commander of Believers! What will you say to your Lord in the Hereafter if He asks you about a heretical novelty *(bid 'ah)* you had seen but failed to obliterate and a Prophetic practice *(Sunnah)* (you had known) but failed to uphold"? `Umar replied, "What a gracious son!, may Allah bless and reward you. My son, your folk have knitted up this matter (structure) knot by knot and stitch by stitch. Should I arrogantly dare to snatch out what is in their hands, I cannot guarantee if they

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258 *Surah AI Ma'ida, 45.*
259 *Surah Al Ma 'ida,.* 47.
260 Shatibi, *Al Muwafagat, 2/ 93-94.*

will rip up for me a crack (dangerous situation) where much blood will be shed. And by Allah to depart this life is more acceptable to me than to have a drop of blood shed because of myself. Won't it be acceptable to you that not a single day of this life will pass while your father will be obliterating **a** heretical novelty or upholding *a Sunnah"*[261]

From the foregoing it can be seen how much the pious Caliph `Umar Ibn Abdul-Aziz suffered in applying the provisions of Islam and how careful he was in fully implementing them in total obedience to Allah Almighty and His Messenger (Pbuh)**,** while being at the same time extremely careful to avoid bloodshed.

4- Realism and Removal of Hardship

Another attribute of Islamic legislation is that it is practicable and realistic, with its provisions based on the extent man can afford without taxing him with obligations that are impossible to perform. The following verses of the Qur'an give evidence to such attribute: *(He releases them from their heavy burdens and from the yokes that were upon them.)*[262] *(Allah Almighty intends every facility for you; He does not want to put you to difficulties*)[263] *(Allah Almighty doth wish to lighten your difficulties: For man was created weak.)*[264] In other verses of the Qur'an Allah Almighty underscores the unequivocal fact that *Shari 'ah is* free from any form of Haraj (difficulty or hardship)**;** that none of its provisions are based thereon and that no person under obligation is taxed beyond his capacity. A Muslim is under obligation to pronounce the dual confessions of the oneness of Allah Almighty and the Prophethood of Muhammad. However, a dumb person is excused from such a prerequisite and his silent confession with his heart *(bi-qalbihi)* will suffice. Prayers are enjoined to be performed five times per day and night in their prescribed postures. However, he who cannot pray in a standing position may do so while sitting or lying on his side if he is unable to sit. An unconscious person is absolved from prayer until he has regained consciousness. In *zakah,* a person who owns the prescribed amount *(nisab)* is required to pay, while a person who does not own such limit is absolved from this duty. Fasting is obligatory for

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261 Al hafizh Jalal-uddin As-Suyouti**,** *Tarikh al Kholafa'* (History of Caliphs), Danil Qalam al Arabi, Aleppo, Syria, 1413H/1993, p**.** 232.

262 *Surah Al Ara* f, 157.

263 *Surah Al Bagara,* 185.

264 *Surah An-Nissa, 28.*

healthy, able and resident Muslims. While travelling a Muslim may not observe fasting, provided he will later observe fasting for the days missed and the same applies to the sick. Pilgrimage is obligatory only for those who can afford it while those who cannot will not be accountable for nonperformance of this duty.

It is clear from the foregoing that this legislation is totally free of difficulty or coercion as Allah Almighty says in the Qur'an: *(He has imposed no difficulty on you in religion.)*[265] *(Allah Almighty doth not wish to place you in difficulty, but to purify you and to complete His favors to you, so that you may be grateful.)*

Haraj, which means forcing someone to do something impossible, is absolutely non-existent in this legislation. On the' contrary, most of the provisions are characterized with facility of application, which is testified to, in addition to the aforementioned verses, by the noble Tradition of Prophet Muhammad *(Sunnah.)* Of these we quote the following: "Make things easy rather than difficult;" "I have been entrusted to convey the tolerant, upright, crystal-clear heavenly creed Here, the tolerant creed means one that is free of unaffordable difficulty; that contains a concession for every valid excuse, whereby it is easily applicable by both the weak and the strong alike. "Upright" means that this creed is similar to that of Abraham (Peace be upon him) in that it allows for the performance of Divine rituals, abolition of those of polytheism (shirk) and unbelief *(kufr)* as well as the interdiction of alteration and deviation. "Crystal-clear" means that the justifications, provisions and purposes of this creed are so unequivocally clear that it does not force people to perform acts beyond their capacity nor does it conceal its intents or purposes.[267]

The Prophet (Pbuh) said: "Allah Almighty has ordained mandatory duties *(faraid)* that you should not miss, and set certain limits that you should not transgress, has interdicted certain things that you should not violate and has remained silent *regarding* certain things out of mercy to you not out of oblivion; so do not ask questions about them," or as reported in other words:

265 *Surah Al hay, 78.*
266 *Surah Al Ma 'ida, 6.*
267 Al-Dihtawi, *Hujjat Allah Al Balighah:* 1/128; Shaykh Shalabi, al-Madkhal, p. *86. 96*

"Allah Almighty has exempted certain things out of mercy to you not out of oblivion; so do not look for them".[268]

The extent of provisions that are subject to exception and dispensations and concessions contained in Islamic law provide ample evidence as to its flexibility and realistic approach as well as its suitability for all time and place. It is the law that should be sought for solutions to problems of generations and countries.

As evidence to the realistic approach adopted in Islam, it can be seen that many Traditions *(hadith)* of the Prophet (Pbuh) show appreciation of man's endeavour and time and the good nature that God has endowed in man. Of these is that Sayyida ' Aisha (May Allah be pleased with her) said, describing the Prophet (Pbuh): "Whenever he had to choose between two matters, he would opt for the easier one unless it amounted to a sin". The Prophet himself said, "Of all deeds the more permanent ones are most liked by Allah Almighty no matter how scanty they may be". And "Of all deeds Allah most likes those which are more permanent". "Do only those deeds that you can afford for Allah Almighty never gets bored until you yourselves have been". And

"This religion is firm and sturdy; delve but gently into it and do not make the worship of God hateful to you, for he who strains his *riding* animal in travel will neither cover a distance nor keep his animal". And "This religion will ever triumph whenever it is challenged by anybody, but all you have to do is to aim properly at the target and close your ranks."

5- Nationalism *(al-Qawmiyyah)*

There is nothing in the principles of Islam to indicate any call to nationalism in the sense that man should have preference and fanaticism for his people and take pride exclusively in affiliating to them, which is meant by the

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268 Tafsir Ibn Jareer al-Tabari (Ibn jarir's Interpretation), *7/55;* Ihkam ul Ahkam, by Ibn *Hazm,* 8/14. *According to "Al Ashbah wa Naza 'ir fi Qawa'id wa Furu ' Figh a!- Shafii 'ya"* by Imam Jalaluddin As- Suyuti "the Prophet was reported to have said in other words" "Allah Almighty has, out of mercy to you rather than out of oblivion, shunned many things so that you may not be taxed therewith, so accept this". Dar Al Kutub al `Ilmiya, Beirut, Lebanon, 1403H/1983, p. *60.*

269 Shaykh Abu Zahra, *Usul,* p. *378.*

call of nationalism. By definition, this call looks parochial, racist and smacks of ignorance as it is not based on any sound principle nor does it guide to any straight path.

Before the advent of Islam, It was the habit of Arabians to boast of their affiliation to a certain clan or tribe but with Islam the following call was made clear and articulate: *(O mankind! We created you from a male and a female and made you into nations and tribes, so that you may know each other. Verily the most honoured of you in the sight of Allah Almighty is he who is the most righteous. And Allah Almighty has full knowledge and is well acquainted (with all things)*[270] The male and female here means Adam and Eve who are the original ancestors of mankind. The significance of this verse of the Qur'an is explained by the cause of its revelation. Al-Qurtubi relates that this verse was revealed in respect of Abi–Hind when the Prophet (Pbuh) ordered the clan of Bani-Bayadah to marry one of their daughters to him. As they objected saying to the Prophet, "Shall we marry our daughters to our slaves?" this verse was revealed. According to Az-Zuhri it was revealed specifically in respect of Abi-Hind while other reports maintain that it was revealed in respect of Thabit Ibn Qays Ibn Shammas who mentioned Ibn Fulanah, the man who was denied space to sit in with the group. The Prophet then asked: "Who mentioned Fulanah?" "I, Messenger of Allah Almighty," said Thabit. The Prophet then said "Look at the faces of people" which he did, and the Prophet asked him "What have you seen?" Thabit replied, "I see white, black and red-complexioned people". "You are no better than any of them except on account of piety," commented the Prophet. It was on this occasion that this verse was revealed. Ibn Abbas relates that on the day of the conquest of Makkah, the Prophet (Pbuh) ordered Bilal to mount the roof of Ka'bah to call for prayer. Commenting on the scene, Itab Ibn Osayd Ibn Abil'is said: "Thank Allah who has taken the life of my father before he could see that day". Couldn't Muhammad find someone to call for prayer *(muadhdhin)* other than this black crow?" commented Al Harith Ibn Hisham. "If Allah wills to change something, He certainly will," said Suhayl Ibn `Umar. "I don't say anything that will be known to the Lord of Heaven," Abu Sufyan commented. Angel Gabriel (Jibril) then came down to the Prophet (Pbuh) and informed him of what they said. Calling them, the Prophet asked them about what they had said and they all confessed and thereupon the above verse was revealed. It was meant to repel them from boasting of lineage and wealth and contempting the poor, for piety

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270 *Surah Al-Hojorat, 13.*

is the standard criterion. Since all mankind descend from one and the same ancestry; Adam and Eve, preference shall be given solely on ground of piety. *According* to At-Tirmidhi, reporting ibn `Umar, the Prophet (Pbuh) said in a speech at Makkah: " O people! Allah has relieved you of the evil-doing of the Jahiliyyah (pre-Islamic period] and the boasting of lineage. Men are two types; one that is righteous, pious and honoured in the sight of Allah and the other is wanton, wretched and dishonoured in the sight of Allah. Mankind are the children of Adam whom Allah created from earth".

In another speech delivered at "Mina" during the days of *tashriq* (as part of the rites of pilgrimage), the Prophet said: "0 people! You have only one God and one father and there is no preference between an Arab and non Arab and vice versa, nor between a Black and Red and vice versa except on account of piety. Have I conveyed the message?" "Yes" the people present said. "Let those present tell those who are absent," the Prophet (Pbuh) added. He also said: "Allah Almighty considers not your lineage, descent, physique nor your wealth but your hearts. He who has a righteous heart will be treated kindly by Allah as you all are the sons of Adam and the most liked by Him are those who are most pious".[271]

One of the established rules of Islamic law is the particularity of the cause that does not preclude the generality of the ruling; although this verse was particularly revealed in respect of a specific Companion of the Prophet, yet it sets the general and permanent rule that all men are equal without distinction and the most honoured are those who are the most pious.

Thus, Arabs, who were accustomed before Islam to boast of their respective clan, tribe or nation came later to boast of belonging to Islam that is next to none as object of pride, honour or noble descent. In this connection, an Arab poet says;

"Islam is my father and no other father have I, Should they boast of Qays's or Tamims (two eminent Arabian tribes)".

Taking the glorious Qur'an and the *Sunnah* of the Prophet (Pbuh) as its constitution, the Islamic State extended from the Arabian Peninsula to Asia, Africa and further to Europe, in line with the Qur'anic verse: *(Verily, this*

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271 Tafsir al Qurtubi, 16/341-342.

nation of yours is a single nation and I am your Lord and Chericher: therefore serve Me [and no other].)[272]

In this connection, we would like to give a quick overview of Arab Nationalism[273].

Origins of Arab Nationalism

By the end of the eighteenth Century, the French revolution erupted, giving rise to a call of several forms of nationalism, whose repercussions have reached the Arab countries. Shortly after, a call for Arab Nationalism emerged, taking **advantage,** as a success factor of the decline of the Ottoman Empire. With the growing weakness of this empire, the forces of unbelief soon assaulted and conquered it.

The call to Arab Nationalism first rose in Lebanon pioneered by a group of Arab Christians such as Elie Smith, Cornelius Van Dyke, Ibrahim al-Yaziji and Boutros al Bustani. These were members of the Letters and Science Society (1847) that was turned into the Syrian Scientific Society (1868.) Since the beginning of this century, Arab Nationalism has taken its way to certain Arab countries sometimes in the form of faint whispers; other times in outspoken words, then in thought and lastly in the form of an outright call.

In some other countries, Arab Nationalism had a great chance to prosper and triumph, with many *leading* pioneers and followers. Several books were written and conferences were held to promote its concept and principles. One of the outstanding pioneers, leaders and thinkers who advocated this call was Mr. Satei' al Husari, whose complete works were compiled by the Arab Unity Studies Center into three volumes amounting to 3118 pages (printed in Beirut, Lebanon, 1985.) I went through these volumes from A to Z in search of a definition by the author of Arab Nationalism, but in vain. Instead of describing or defining it, Satei' al-Husari the pioneer of Arab Nationalism talks about Russia and its covetous schemes, German history, conditions in Poland or Freedoms in France and so on and so forth.

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272 *SurahAlAnbiya'*, 91.,

273 The following pages are excerpted from our book: *Fi! Qawmiyyah wal Ilmaniyyah war-Riddah wal Fa 'idah ar-Ribawiyyah:* (On Nationalism, Secularism, Apostacy and Usury-based Interest), Tripoli, Lebanon, P.O. *578*, pp.63-71

I do admit the man is well-versed in history and sociology. However, his failure together with his followers to find out a definition of Arab Nationalism is attributed to the fact that it is not a "theory" that is difficult to understand or impossible to conceive. Nor is it a principle or a religion, in spite of the attempts by its advocates to overload it beyond its significance and place it on equal, if not a higher, footing with the religion of Islam, but in vain.

Having failed to put up a definition of Arab Nationalism; set on talking about its basic components and goals.

I have noted that the most outstanding goal targeted by the advocates of Arab Nationalism is the unification of Arab countries from the Atlantic Ocean to the Arabian Gulf. On my part, I do support from all my heart any unifying movement, but suppose all Arab countries have been united, would not they need a religion to guide their steps to the right path? And is there any better principle or religion than Islam?

The Arab League that is based on the concept of Arabism has 22 member states with about 200 million people, while the Organization of Islamic Conference that is based on Islam comprises 44 member-states with almost one billion people i.e. all Muslims of the world. Thus, which is better to support? Nationalism or Islam? How sweet is the saying of the poet of Islam, Muhammad Iqbal (May Allah have mercy on him) addressing Muslims: "Compare not the nations of the West with yours; the nation of the Hashimite Prophet (Pbuh) has a unique composition. They depend for their unity on homeland and progeny while your unity, you Muslims depend on the strength of religion.

Sate'i al-Husari further says: "The Islamic Movement was a significant historical event that brought about a serious revolutionary transformation in the conditions of Arabs. It also had a very strong impact on the general course of history. This is a fact that can never be denied by any researcher, Arab or non-Arab, Muslim or non-Muslim. However, the Islamic Movement has not been fully associated with Arab Nationalism... etc". He then adds: " With the advent of Islam, the history of the Arabs entered into a new important phase".

Mr. Al-Husari names Islam that Allah Almighty describe, saying: *(Verily, to Allah the religion is Islam)* as "the Islamic Movement". It was that through this religion that Allah had saved the Arabs from devastation as they used to look upon female gender with contempt and many tribes even buried

new-born girls alive drank and boasted of drinking wine that is the mother of all sins. Before Islam, Arabs used to assault and terminate their weak neighbours.' After all these practices and even more, with Islam they became the best people among mankind in the sense that it does not uphold wrongdoing but rather enjoins good work. They, thus, meritoriously deserve the sublime title.

Awarded to them by the Creator, Most Exalted He may Be ***(Ye are the best community, brought out for mankind enjoining what is right, forbidding what is wrong and believing in Allah Almighty. If only the People of the Book had faith, it were best for them: among them are some who have faith, but most of them are perverted transgressors.)***[274]

This is what Islam made of the Arabs. Nevertheless the pioneer of Arab Nationalism terms this religion as the Islamic Movement, as if he were talking about Lenin, Mao, Guivara or other anonymities of history and usurpers of state positions.

How much I wished Mr. Al-Husar'i would dedicate his erudition and writing talent to the advocacy of Islam rather than Arab Nationalism, in which case he would be much more beneficial to others and to himself in his lifetime and after death. In this connection, Allah Almighty says in the Qur'an:

> ***(Who is better in speech than one who calls (men) to Allah Almighty, works righteousness, and says: '7 am of those who surrender [to Allah*** 'l)?[275]

> ***(Who can be better in religion than one who submits his whole self to Allah, does good and follows the way of Abraham the true in faith? For Allah did take Abraham as a close fellow.)***[276]

> ***(Verily, this is My way, leading straight: Follow it: Follow not any other (ways.) They will scatter you about from His (great way): thus doth He command you so that you may be righteous.)***[277]

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274 *Surah Al 'Imran, 110.*
275 *Surah* Fussilat, 33.
276 *Surah An-Nisa',* 125.
277 *Surah Al An am,* 153.

Imam Ahmad Ibn Hanbal, reported from Abdullah Ibn Mas'ud (May Allah be satisfied with him), that the Prophet (Pbuh) drew a line saying, "**This** straight line is the Path of Allah"; then drawing two lines on his right and left, said: "On each of both paths there stands a Satan calling people to it and then quoted the verse:

(Verily, this is My way, leading straight...)"

(0 mankind! Verily there hath come to you a convincing proof from your Lord: For We have sent unto you a light that is manifest. Then as for those who believe in Allah Almighty and hold fast to Him soon will He admit them to Mercy and Grace from Himself and guide them to Him by a straight path.[278]

This is what people, all people should call for, defend and boast of. The Prophet of Islam won the most sublime honour from his Lord who told him *(Verily! You are of great character.)* The Prophet (Pbuh) has attained the highest peaks of honour, greatness and sublimity as never attained since the creation of mankind and all time to come until Allah Almighty will inherit the whole earth with all His creatures. One with such prestige in the sight of Allah Almighty will never look forward to any other status with His creatures.

No wonder that the personality of the Prophet (Pbuh) has been subject of enquiry and laudation by Muslims. Moreover, the Prophet has also been given high praise and veneration by non-Muslims across history. The latest I can remember is the American Michael Hart, whose book "The Great Hundred" examines the personalities of 100 world figures since Adam (Peace be on him) up to the present time. In this book, Hart says that Muhammad is the greatest figure in the history of mankind as he has caused such reform and impact as never made by anybody else. On the contrary, I have failed to trace a single statement, article, page or sentence by the pioneer of Arab Nationalism Sate'i al-Husari in praise of the Prophet (Pbuh.)

Making a mountain out of a small hill, al-Husari gives high tribute and aggrandizes petty and immature ideas and opinions. For example, he talks about Herder and Fichte saying of the latter that (he belonged to the age of enlightenment) and that (he was preoccupied with pure intellectual thoughts,

278 *Surah, An Nisa' ,* 174.

tended to be universal and indifferent to territorial and national issues.)[279] Similar opinions abound in al-Husari's works.

He further says, "the basic core in forming a nation and building of nationalism is the unity of language and unity of history, which both lead to the unity of ethos and sentiments, of suffering and aspirations as well as culture. With all these combined, people will feel that they belong to the one and same nation, as distinct from others. However, neither religion, state nor economic life constitute basic components of a nation etc". [280]

Commenting on the foregoing, we say ,

Religion is the most outstanding criterion for a nation; the only factor that unifies and combines all mankind, Arabs and non-Arabs, makes all feel like brothers. Thus, a Japanese Muslim will have the same feelings as his brother the Russian Muslim with the latter feeling the suffering of his brother that an American Muslim has and so on and so forth.

The above-mentioned statements by al-Husar'i must keep a Muslim away from Nationalism, leaving him at cross-roads with the nationalists. While a Muslim calls for the worship of Allah Almighty; for fraternity, love and equality between all mankind, regardless of nation or language preached by Islam, nationalists only call for nationalism claiming that "the basic core in forming a nation and building of nationalism is the unity of language and unity of history". In other words, they mean that whoever is not an Arab or belongs not to the history of the Arabs, is not considered a brother or a member of their community.

Hence any fair reader will immediately realize the difference between Islam and nationalism or between advocates of Islam and those of nationalism.

Mercy may be to Mr. Al Mawdudi who held in this respect that: "It is neither acceptable nor possible that there may exist within the Muslim nation any forms of nationalism based on colour, race, language or home countries, in the same way that it is not possible within many other states. Any Muslim who wants to remain so should obliterate from his heart any sentiment that is based

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279 ***See*** *Al A 'amal al Qawmiyyah* - Sate'i al Husari ,Part II, 49, 13, 1813.

280 See *Al A 'ama! a! Qawmiyyah* - Sate'i al Husari, Part II, 210,13,1975.

on other than Islam and should cut off any relations or affiliations based on colour or national soil.[281]"

Let us in this regard recall that the brotherhood between al-Ansar (The Supporters) . and al- Muhajirin (The immigrants), which is an excellent example unparalleled in history, was based on faith in Allah Almighty and His Messenger (Pbuh) rather than on common language or history.

In this world, what man needs most is a religion that guides him to what he should do and what to avoid. What use is there in the unity of language in the reckoning of the deeds of this world? Does it guide man to righteous behaviour and good manners? Does it lead to mature and sensible conduct or stop crimes? And does "the unity of history" lead to the above- mentioned ends?

As to the hereafter, every sensible man believes in the existence of an everlasting afterworld where man will be reckoned by Allah Almighty on the basis of his deeds during his lifetime as stated in the Qur'an:

> (.. *so that He recompenses those who do evil, according to their deeds and He rewards those who do good with what is best.)*[282]

> *(It is Allah that begins the creation, then repeats it; then it returns to Him.)*[283]

> *(It is He Who begins (the process) of creation, then repeats it; and for Him it is most easy; and to Him belongs the loftiest similitude (we can think of) in the heavens and on earth: For He is Exalted in Might, Full of Wisdom.)*[284]

The above verses clearly show that the afterworld is an indisputable fact. Can "the unity of language and the unity of history be of any use in the afterworld. Can we say to our Lord on the Day of Judgment "0 Allah! judge us simply because we speak a common language, have a common history and

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281 Research by Ahmad Al Bashir, *Wujub Tatbig Al Shari 'ah Al Islamiya wa al Shubuhat alati tuthar howl Tatbiqiha,* published by Imam Muhammad Ibn Saud Islamic University, Al Riyadh, 1404H/1984, pp.465-466.

282 *Surah An Najm,* 31.

283 *Surah Ar-Rum, 11.*

284 *Surah Ar-Rum, 27.*

belong to the same nation extending from the Atlantic Ocean to the Arabian . Gulf".

Will any of this be of any avail?

No sensible person thinks that all these pretexts will be of any avail; what only counts is good deeds alone, no matter whether he speaks Arabic or otherwise.

(But those who believe and do deeds of righteousness, We shall soon admit them to Gardens with rivers flowing beneath, to dwell therein forever. Allah 's promise is the truth and whose words can be truer than Allah 's)?[285]

(Neither your desires nor those of the People of the Book (can prevail): whoever works evil, will be requited accordingly. Nor will he find, besides Allah any protector or helper. If any do deeds of righteousness, be they male or female, and have faith, they enter Garden, and not the least injustice will be done to t h e m .)

"By the foregoing we had not the least intention to hold a comparison between Islam and Arab Nationalism as the former is more universal, all-encompassing and therefore more sublime. This would sound like saying that a sword is sharper than a stick. Our intention is rather to prove that Arab Nationalism is a racist, narrow-minded, localized and non-Muslim concept. Based on the writings of Sate'i al-Husarl, the reader may easily condemn him and his followers".[287].

It is really regrettable that the now extinct Communism had borrowed the authentic principle of non-discrimination between mankind from Islam as there was no distinction between a Russian, Bulgarian or Arab communist, who were all . dubbed as "comrades". However, when it was imposed with the force of arms, no call was spelled out for any nationalism in a nation with a population of 210 million.

With the collapse of Communism that was based on unbelief, indifference to religion or morals, non-recognition of private ownership and

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285 *Surah An Nisa',* 122. *Surah*
286 *An-Nisa,* 123-124.
287 Our above-mentioned book, pp. *63-75.*

denial of public freedoms, forms of ethnic nationalism popped up in the former Soviet Union and almost each and every people demanded independence and self-rule, upon which many new republics came into being.

When the former Yugoslavia was ruled with the force of arms under Communism, calls for nationalism were hushed up, but with the defeat and collapse of Communism there, ethnic nationalism also popped up and wars broke out, killing millions and making thousands homeless.

It should not be understood from this, that I want to give any credit to extinct Communism, which is my as well as every Muslim's enemy. All I mean is to let all people know the wisdom of Islam as it calls for the worship of Allah Almighty, *holding* all mankind together into bonds of fraternity. I want also all people to recognize the grace of Allah Almighty to mankind as He says in the Qur'an: *(Verily, Allah is full of grace and bounty to men: yet most men give no thanks.)*[288]

Related to the principle of nationalism, we further quote another example from Arab countries, whose leaders voiced a call to Arab Nationalism and Arabism and in return non-Arabs called for independence and secession, giving way to wars which are still flaring up. It follows then that if ever there were calls for nationalism, differences and wars broke out.

Islam is the religion, the principle and the right path to safety and avoidance of perils in both this world and the hereafter as Allah Almighty says:

(Who is better in speech than one who calls (men) to Allah Almighty, works righteousness, and says, `7 am of those who surrender (to Allah) in Islam ')?[29]

(If anyone contends with the Messenger even after Guidance has been plainly conveyed to him and follows a path other than that becoming to men of faith, We shall leave him in the path he hath chosen, and land him in Hell, what an evil refuge !)[29]

288 *Surah Ghafer*, 61.
289 *Surah Fussilat, 33.*
290 *Surah An Nisa '* , 115.

6- Private Property

Moving to the economic system, we find that Islamic legislation -like all matters .pertaining to Islam- has brought in the highest and the best principles, including its recognition and adoption of individual property and ownership.[291]

Islam adopted and recognized individual property allowing it to grow and prosper, entrenching it and *providing* it with absolute protection from those who would wish to minimize its importance, or out of greed, rob it of substance and meaning.

In its strict punishment of cutting off the hand of the thief, Islam meant to protect individual property; as Allah Almighty said: *(The thief be he man or woman, cut* off *their hands in punishment for their ill gains, in just deserts of Allah; Allah is Mighty and Wise.)*[292]

The Prophet (Pbuh) said: " Whosoever shall die for his property is a martyr". Narrated by Ahmad b. Hanbal, Al Bukhari and Muslim from ' Aisha and Said Ibn Zayd. He also said: "He who unjustly acquires land shall meet with Allah's wrath on the Day of Judgment". Narrated by Ahmad and Muslim as reported by Wa'il. He then said: "He who unjustly seizes that which belongs to a Muslim with his right hand, Allah shall send him to hell and forbid to him entry into Paradise". Narrated by Ahmad b. Hanbal, Muslim, Al Nasa'i and Ibn Majah.

Islam prohibited cheating, usurpation, treachery, injustice, usury, monopoly, illegal acquisition of another's property in order to defend and protect individual ownership.

One of the rulings in *Shari 'ah is* that if a person transgresses the property of a Muslim to steal or usurp it, the owner has the right to fight him and defend himself. Should the aggressor die he shall go to Hell, should the Muslim die he shall be a martyr, for as the Prophet (Pbuh) said: "He who dies in defence of his property is a martyr". Narrated by Ahmad, Al Bukhari, Muslim, At- Tirmidhi and Al Nasa'i.

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291 Individual property is that which belongs to a particular person or persons who own it equally or in different parts.

292 *Surah Al Ma 'ida, 103.*

Though Islam encouraged and recognized individual ownership, at the same time it legislated the systems which would distribute, limit and divide it in such a way as to prevent its accumulation in the hands of one person or one group:

1. Islam levied *al zakah* on property. Allah Almighty decreed it in the Qur'an in many *ayat* when He said: *(And those in whose wealth there is a right for the beggar and the destitute.)*[293] As also: *(And they are ordered naught except to serve Allah, keeping religion pure for Him, as men by nature upright, to establish worship and to pay zakah. That is true religion)* Allah said: *(Take thou from their money; thus shall they be purified and cleansed thereby.)*[295] *(Allah also said: `carry out your prayers and pay out your due zakah ")*

Zakah is also the subject of many *hadith* of the Prophet (Pbuh) such as: "Islam was built on five pillars: the *Shahadah,* there is no god but Allah and Muhammad is His Prophet, the *salat* (Prayers), *zakat, al* hajj and fasting the month of Ramadan".

Zakah, in addition to being one of the cornerstones of Islam, is beneficial in many ways. There can be no doubt that were the system of *zakah* to be soundly implemented and operated as Islam ordained, the Muslim society would prosper economically, bringing happiness to the people. The rich would feel safe, the poor would feel protected and thus there would be no psychological conflict between poor and rich.

Instead there would be love and good relations, because in imposing *zakah,* Islam took into consideration sound economic bases, joining the public good to the interests of the owner of capital. Islam thus intended to uplift the poor from their poverty, to help the weak, to repay the rich and protect them, to cleanse money, and build up the society on solid bases and firm foundations. *Zakah* maintains the economic balance in society; and it is also a form of worship.

2. Islam also legislated inheritance of property. Allah said: *(Allah chargeth you concerning the provision for your children: to the male*

293 *Surah Al Ma 'aria, 24-25.*
294 *Surah Al Baiena, 5*
295 *Surah Al Tawba, 103.*
296 *Surah Al Hajj, 78.*

the equivalent of the portion of two females, and if there be more than two women, then they shall have two-thirds of the inheritance, and if there be only one, then she shall have half To each of his (the deceased) parents a sixth of the inheritance if he has a child; if he has no child and his parents are his heirs, then to his mother belongs the third, yet in case he has brothers then to his mother is one sixth, after any legacy he may have bequeathed or debt been paid. Your parents and your children: ye know not which of them is closer to you and more useful. It is an injunction from Allah for He knowth and He is Wise. And unto you belongeth half of what your wives leave if they have no child; if they have a child to you belongs the fourth of what they leave after any legacy they may have bequeathed or debt repaid And unto them belongeth the fourth of that which ye leave if ye have no child; but if ye have a child then one eighth of that which ye leave after any legacy bequeathed or debt repaid And if a man or a woman has a distant heir (having left neither parent nor child) and he (she) have a brother or sister (only on the mother's side) then to each of them twain (brother and sister) a sixth, and if they be more than two then they shall share the third after any legacy bequeathed or debt repaid, not infringing the right of the heirs by bequeathing more than a third of the estate. This is Allah 's command and Allah is Ever-Knowing and Ever-Forbearing. These are the limits imposed by Allah. Who so obeyth Allah and His Prophet shall enter gardens under which flow rivers and there they shall reside ever after. That is the magnificent triumph. And whoso disobeyth Allah and His Prophet and transgress his commands, he shall enter fire to remain therein forever and he shall have a degrading torment.)[297]

(They ask thee for a pronouncement. Say Allah hath pronounced concerning distant kindred If a man dies childless and he has a sister, she shall have half the heritage, and he would have inherited her had she died childless. And if there be two sisters, then they shall get two-thirds of the heritage, and if they be brethren and sisters, then the male shall inherit the share of two females. Allah expounded unto you so that ye err not, for He Knowth all.)[298]

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297 *Surah An Nis('',* 11-14.

298 *Surah An Nis(' '* 176.

These quotations from the Qur'an lay down the basis of inheritance and its distribution for Muslims. The inheritance system in Islam is a wonderful system aiming mainly at dividing large estates and splitting them into smaller portions for the greater benefit of the largest possible number of owners.

Gustav Lebon in his book *The Civilization of the Arabs* states that "the principles of inheritance stipulated by the Qur'an are to a large extent just and fair... Islamic *Shari 'ah* has given wives, that some allege are not well treated by Muslims, rights of inheritance that are unequalled in our laws".[299]

3. Islam has also expounded its law of bequest: Allah said: *(It is prescribed unto you, when death approacheth one of you, if he leaves wealth, that he bequeathes unto parents and near relatives in kindness. This is a duty for all those who wish to ward off evil. And who so changes the will after he has heard it, then the sin shall fall on him who changeth it. But he who fears from the bequeather an unjust or sinful clause, and who makes peace between the parties, then no sin shall befall him for Allah is Ever-Forgiving and Ever Merciful.)*

From these *ayat* we learn that a Muslim has a right in his wealth and property dependent on his death to the effect that he can bequeathe a part of his heritage to other than his heirs, for says the Prophet: "There is no bequest for legal heirs" narrated by Aldaraqutni from Jabir.

This is a noble and great legislation aiming at distributing wealth and making portions smaller. If the Muslim knows that after his death his wealth shall be limited to a small number of heirs, he can, by will, give some of his wealth to others as indicated by the Prophet when he says: "One-third and it is much," narrated by Ad-Darimi from Amir bin Sa' d from his father who said: "I explained my worry to the Prophet, as I approached death. He came to me and I said: "0 Allah's Prophet, I am ailing and I have great wealth and my daughter inherits me, shall I give away my wealth?" said he. "No". "Then half'? Said he: "No". So I said: "One-third"? and he said: "One-third and that is much.

299 *Ruh addin Al Islami* (The Spirit of *Islam), p.* 250.

300 *Surah Al Baqara,* 180-182.

If you leave your heirs wealthy, that is better than leaving them poor and in need. Whatever you spend including what you feed your wife with, you shall be recompensed".[301]

Islam has given a person's will a prominent place for it comes immediately after debts - it is paid out of the deceased's estate after payment of his debts and before distribution of the inheritance for Allah says:

(After bequeathal or repayment of debts)[302]

4. Islam also legislated the *wagf* (mortmain) in a person's wealth-namely prohibiting ownership of a property and having its revenue used for good purposes defined by the owner. *Waqf* is a noble system for it comprises giving up individual ownership freely for the greater goal of the society. A property that is in *wagf* is no one's property, its benefits shall be distributed among the poor, ill or needy and for charitable purposes.

5. Islam also legislated *al sadaqah* (charity-donations) and encouraged it often. For Allah says:

(Those who spend their wealth according to Allah 's way, shall be like a grain that groweth seven ears, and in every ear there shall be one hundred grains. Allah orders your wealth to grow manifold as He wishes and Allah is All Embracing, Ever Knowing.)[303]

(And whatsoever good thing you spend, it is for yourselves, when ye spend it only in search of Allah 's good will; whatsoever good thing ye spend, it shall be repaid to you in full and ye shall not be wronged.)[304]

(Those who spend their wealth by night or by day, overtly or covertly, verily their reward is with their Lord, and they shall have no fear nor grief) [305]

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301 Musnad Aldarimi, vol. *2, p. 407.*
302 *Surah An –Nisa', 12.*
303 *Surah Al Baqara. 261.*
304 *Surah Al Baqara, 272.*
305 *Surah Al Baqara.* 274.

(Whosoever shall lend unto Allah a benevolent loan (without interest) he shall have it back manifold.)

(0 ye believers spend of your good earnings and what we have given you from the good earth and do not have recourse to that which is impure for your expending...)

(It is not righteousness that ye turn your faces to the east and to the west; righteous is to believe in Allah and the last day, the angels, and His book and the Prophets and give wealth, for love of Him, to kinsfolk, to orphans, to the needy and the wayfarer, to those who ask and to set slaves free. Those who observe proper prayers, pay out zakat; keep your pledge, be patient in times of tribulation and adversity and in violence; these are the truthful and the Good fearing.)

The Prophet said: "Charity extinguishes sin as water extinguishes fire". There are other texts that encourage *zakah* and charity. One should not think that Islam considers charity a condescending act from rich to poor; in Islam charity from the money of the wealthy " is a due share in their wealth to the beggar and the deprived".

Islam has taught its followers not to cancel out the good in charity by looking down on the poor, hurting them or speaking roughly to them. Allah says: (A kind word with forgiveness, is better than giving a donation followed by injury. Allah is All-Sufficient, Ever-Forbearing. 0 ye believers! Render not vain your donations by condescension and injury, like him who spends that people might see him doing so, while he does not believe in Allah and the last day. He is like a rock covered by dust; a rainstorm shall smite it, leaving it smooth and bare. They have no upper hand over that which they gain. Allah guideth not the disbelievers.) 307

All this undoubtedly meets the needs of the poor and brings succour to the helpless. At the same time, it leads to wealth distribution, erases monopoly and control by one or a few. If it proves

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306 *Surah Al Baqara, 245.*

[307] *Surat Al Baqara, 267.*

anything, it shows the justice of Islam, its genius, infinite foresight, unseen in other economic theory.

Recognition of private property and ownership encourages people to work and urges them. This, the Creator in His Glory knew. There is no text in the Glorious Qur'an which limits individual ownership; neither in the Prophet's sayings or *Sunnah,* nor in the consensual opinion of Islam's *ulamah.* A Muslim has the absolute right to own any amount of money or gold, silver houses or land. There is no ceiling, provided he pays out the duties on these riches, the *zakah,* and anything above that is voluntary.

When 43 years ago some Arab governments decreed laws restricting a person's property in land, real-estate and bank deposits, while the rest is seized or put under sequestration, some people wrote and said that they supported this in the name of Islam. The truth is totally different. When things changed, these writers' voices dimmed and we heard not even a whisper.

Justice would justify trying those and on whose wealth doubt and suspicion were shed. In the event of proof that the acquisition was the result of usurpation, cheating, fraud or robbery, the head of state has the right to confiscate these properties after a just trial and due process. However, to confiscate the property and money of people in the manner I have mentioned, this has no basis whatever in Islamic legislation.

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308 *Nazarat fi Al Islam*(Perception *of Islam)* by the author, pp. 77-82.

Chapter III

CONTRIBUTION OF ISLAMIC LAW TO CONTEMPORARY LEGAL SCIENCE

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After indicating the philosophy of legislation in some fields, we would like to affirm once again that defining the philosophy in all matters setforth by Islamic legislation requires a great deal of effort and time. We shall content ourselves to what we have referred to and move on to the participation of legislation in modem law in general.

I would like here to quote, on law, from the brilliant comment of the late martyr Abdel Qadir `Duda who said: " I apologize to the law, for I shall attack the law... I apologize to the law as a meaning, and attack in law the text and the structure... I apologize to the law if I attack it for I am one of its advocates, or if I show people some of the truths, or if I should interpret it in a manner to depreciate its majesty, or to belittle its importance to people and encourage them to oppose it"

I have said in the foreword that I shall not deal with all kinds of law, for this would be a lengthy research; I shall just deal with civil and criminal law.

I would like, first of all, to show how civil laws reached the Arab countries, which were ruled by Islamic *Shari* 'ah.

The Contribution of Islamic *Shari'ah* to Civil Law

Historic Overview

Islamic legislation governed the Islamic countries during the era of the Prophet Muhammad (Pbuh) and the era of the Rashidin Caliphs and after them also; there was no omission, flaw or fault in Islamic legislation had been detected.

Judges and scholars constantly referred to the Glorious Qur'an and the Prophet's *Sunnah* and to the consensus. If they found not what they were looking for, they worked according to analogy *(al qqyas)* or one of the proofs referred to. History did *not* record any shortcoming in the opinions of the

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The martyr, Abdel Qadir ' Ouda, *Islam* and our legal Situation, Al Mukhtar al *Islami* for publishing and distribution, Cairo, Fifth Ed. 1397H/ 1977, p. 7.

Muslim jurists nor did they remain passive before any problem. Their thoughts were rich and covered all aspects of life. They laid down brilliant theories, exemplary rules and solutions. They left us a heritage that should be a source of pride to all Muslims, and so it shall be for Muslims so long as they have before them Allah's Book and the Prophet's *Sunnah*. These are the foundations of Islamic Jurisprudence.

This state of affairs continued until the Ottoman state, which governed according to Islam in its early days. After that it began to intake the West and decreed some laws derived from French and Italian law.[310] When the Ottoman Caliphate ended in 1924, the Turks wished to save time and effort, so they translated some French, Swiss, Italian and German laws.[311] As the Arabs countries were dependent on Turkey, they were, in the beginning, governed according to Islam.

As the British, French and Italians started to occupy the Arab countries in the East and the West, it was only normal for them, to govern according to their own laws, and to give ultimate superiority to these laws. Thus foreign laws gained access to the Islamic countries. I would like to briefly concentrate on civil law and how it reached the Arab countries. The oldest Arab civil law is the Egyptian civil law. What is the history behind it and how did it come about?

Background to the Egyptian Law

Mr. Manoury was a French lawyer who lived in Alexandria. Nubar Pasha appointed him Secretary of the International Committee entrusted with examining the project of establishing Mixed Courts *(mahkama mukhtaleta)* in Egypt. He was asked to lay down the mixed legislation in 1872, which task he concluded in one year.

Manoury founded the mixed civil legislation on French law and the old Italian civil law, which, in turn, was translated into Arabic. When the Egyptian government at the time, wished to reform the system of national justice, it asked Mr. Moriondo to do so. Moriondo was an Italian lawyer and he was appointed judge in 1875 in Alexandria's Mixed Court. He was also Attorney at

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310 Sobhi Al Mahmosani, Falsafat al-Tashri 'fi'l Islam, Dar Al 'Ilm lil Mallayin, Beirut, 1980, Fifth Ed., pp. *91-92*.

311 Idem pp. 104-105.

the Mixed Cassation Court and that was his job when he was asked to set out the legislation mentioned above. All he did was to copy the civil mixed legislation in French. He was assisted in this work by Muhammad Qadri Pasha. This law was decreed on October 28, 1883 and then translated into Arabic.

One of the main draw backs of this Egyptian civil law was that it copied old French laws to the letter, laws which were passed at the beginning of the 19th century and which left out many important matters; they were ambivalent and brief, unclear, contradictory and replete with serious errors. In addition, some of its provisions were copied from French law were contradictory to Islamic *Shari 'ah.* For instance it stipulated that a woman be financially responsible for her husband, and for the wife of her father-in-law-(mother-in-law) and other decrees that contravene Islamic *Shari 'ah.* It also teemed with many errors of form. Add to that, that the civil law was first drafted in French and then translated into Arabic. These were two texts, the original in French and a translation in Arabic. People were confused as to which text to use. There were often problems due to the errors in the Arabic translation, which lacked the required precision. Thus we faced a double legislative text.

This law was in force since Moriondo laid it down in 1883 despite all its drawbacks. There were many complaints about it and in several instances steps were taken to amend it. Finally the initial draft for a new civil law was drawn up and printed in 1942. For nearly three years, the Ministry of Justice asked the opinions of judges, lawyers, jurists and judicial organizations and societies concerning this law. Another committee was set up to examine all these proposals. The law was then put to the lower and upper houses of Parliament in Egypt, which eventually ratified it. The law was published in the Official Gazette and came into effect on October 15, 1949.[312] The new Egyptian civil law is the oldest Arab civil law issued in the Arab states. The law comprised 1591 articles. Islamic *Shari 'ah* was not the only source for the new law's provisions. It was referred to in the third position. Article I of the Preambular Chapter of the preparatory work stipulated the following:

1. Statutory laws are in force on all matters dealt within these law both in words and substance.

312 Abdel Razzak Ahmed As-Sanhoury, *Al Wassit fi Sharh a! Qanun a! Madani al Jadid,* Dar al Nahda al Arabia, Cairo, vol.1, pp. 2-25.

2. If there be no legislative text that can be applied, then the judge shall rule in accordance with custom; if there be none, then in accordance with Islamic *Shari 'ah,* and should there be none, then in accordance with natural law and the rules of natural justice.

We can see from this article that first, the texts of the law applied, in expression or substance; if there be none then the judge shall resort to the custom in the second instance, and if none were available, then in accordance with Islamic *Shari 'ah* in the third instance. However there was no similar article in the previous civil legislation i.e., Islamic *Shari 'ah* was not one of the sources of the civil law in any case, neither in first nor in third place, as stipulated by the new civil law.

Article 29 of the internal regulations of national courts, and article 52 of the internal regulations of mixed courts stated the following:

> Article 29- If there be no clear text in the law, then judgment shall be rendered according to the rules of justice. In commercial matters such rules shall also be in force side by side with commercial custom.
>
> Article 52- If there be no text in the law applicable to the case under examination, or if the text be unclear or has shortcomings, the judge shall apply the principles of natural law and the rules of justice *and* equity.

In the preliminary project, Islamic *Shari 'ah* came in last place, shamefully. This is the text:

1. Legislative texts shall apply- in words and substance- to all matters dealt with by these texts.
2. If there be no legislative text that can be applied, then the judge shall rule according to <u>custom.</u> If there be none, then in <u>accordance with the principles of natural law and justice.</u>
3. He shall resort to the rulings accepted by justice and jurisprudence *(figh)* be they Egyptian or foreign. He shall also resort to the principles of Islamic *Shari 'ah*.[313]

313 ***Majmu'ah al A'mal al-Tahiriah*** (Preparatory work), Vol, I, pp. 182-183.

Thus, Islamic *Shari 'ah* in positive legislation came in last. But what can be expected of Mr. Moriondo (Italian lawyer) who set up the old civil law, and what can be expected from (De Belfon) who was member of the Committee that set up Article I of the draft project. Can we expect them to ask judges to be inspired by the Glorious Qur'an or the noble *Sunnah* or the verdicts of Muslim Imams and Jurists- May Allah's Peace be on them?

Yes indeed this happened in the country that houses Al Azhar Al Sharif and its great scholars. They have always been and are indeed ready to provide sound solutions derived from Islamic legislation.

Other civil laws were thereafter issued in many Arab countries over extended time periods. Dr. Al Sanhoury, Egypt's great jurist, played an important role in all of them.

Respect for French jurists and the legal system was instilled in Dr. Al Sanhoury at an early age. He said: "If I have distanced myself from some legal opinions that I previously espoused' in the two books I referred to,[314] this is the nature of the human mind. It does not freeze at any one plan of theory, for it cannot absorb truth in the absolute, and today it may understand that which it did not grasp yesterday." Then in a kind of apology to French law that he really did not need, he says: "I did not do so out of belittlement of French law. French law is the wide-open space that hosted us, and we lived for a time as its guests. But the time has come for the guest to go home; a home now built on solid foundations. Egypt's justice system has taken giant steps forward in 75 years. It now has the right to be independent. It is rich and varied; wherein the researcher can find a reference to every question. It has found itself and advanced much more than Egyptian jurisprudence and therefore it must now assume its full responsibilities". In another instance he recognizes that Egyptian justice was occupied and adds: "The occupier was in this case French".[315]

The question that comes to mind is: Why didn't those concerned become the guests of Islamic jurisprudence instead of French justice and jurisprudence?

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314 The books are: The Nazariyyat al= Aqd *(The theory of contract) & Al-Nazariyyat a!- Ammah li'l Iltiz am at* (The general theory of commitments.)

315 Sanhuri, Al Wassit, p.5.

The answer in my opinion is that the responsibility lies at the door of the civil culture that was imposed at that time. Islamic *Shari 'ah* had no place in educational programs. Proof of that is in the life of Al Sanhoury himself. After studying Islamic *Shari 'ah* he changed course and became enthusiastic about Islamic jurisprudence. In a lecture he once said: " I put to you that you will find in the arsenal of Islamic *Shari 'ah,* principles and theories not less advanced in text and rigor than the most modern principles and theories and the most advanced in world jurisprudence".[316]

He also wrote in Al Wasit: "The time has come for Egyptian jurists to cooperate with their colleagues... to stand together to lay down strong foundations (for Arab civil law) based on Islamic jurisprudence- the law of the future for all Arab states".[317]

His book: *Masadir al Haq Fi 'l-Fiqh al-Islami* (The Sources of Right in Islamic Jurisprudence) is the best proof of his change from Western jurisprudence to Islamic jurisprudence. I benefited a great deal from his book, as did many others, Allah's peace and blessings be upon him.

Thus sovereignty was given to civil law in most of the Arab states. Islamic jurisprudence took a smaller place and was not given the chance to have its say in civil courts or to solve problems. It came after custom, which in turn came after the texts of civil law.

Islamic legislation was restricted to cases of family law only in *Shari 'ah* Courts. Justice in many Arab states was divided into two parts- civil justice applying civil laws, and *Shari 'ah* justice applying Islamic legislation. Judges of the civil system received powers and privileges that at origin were those of the *Shari 'ah* Courts, but were taken away from the judges of these latter courts.

A man who is a just Muslim, writing the history of this period, can only pay tribute, in all honesty to the conduct of some Arab countries which maintained the name *"Al Mahkama Al Shariiyya" (Shari 'ah* Court) and the

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[316] Paragraph from the book *Malamih al-Mujtama 'al Muslim (Features of the Muslim Society* by Shaykh Youssef Al Qaradawy, Maktabah Wahba, Cairo, First Ed. 1414H/1993, *pp.* 177-178, quoted from *Al Ahram* newspaper of January 1, 1937.

[317] *Al Wassit,* "r.

rulings of Islamic legislation in all matters, giving all judges the rights and privileges they expect and observe.

Men of good intentions and scholars in all the Arab countries called for reform of the judicial systems and asked that Islamic *Shari 'ah* be the only reference and primary source of all laws. There were certain steps taken in that direction and Islamic jurisprudence began to assume its rightful place.

The Constitution of the Arab Republic of Egypt dated April 17, 1971 stated in Article 6: "The State affirms the moral values and Islamic *Shari 'ah is* adopted as the main source of legislation" Article 2 of Egypt's Constitution states: "Islam is the religion of the State and Arabic is its official language. The principles of Islamic *Shari 'ah* are the main source of legislation".[318]

Paragraph 2, Article I of the draft amendment to Kuwaiti Civil Law states: "Statutory texts apply to matters dealt with by these texts in their words and substance. If there be no statutory text, the judge shall rule in accordance with the Islamic jurisprudence closest to the reality and interest of the state; if not then according to the custom".

Islamic *Shari 'ah* – and let me repeat it once again- is perfectly adapted to providing a sound opinion in all matters now and in future in civil or other matters. Examples are too many to be enumerated.

In 1410H, public opinion, the judicial system and the courts in Britain and the United States were concerned by a legal problem that Islamic jurisprudence had decided 14 centuries ago. The Middle East (Sharq al Awsat) newspaper published it on 17 and 18 Sha'ban in 1410H namely: Can a child's testimony be accepted in court? The question concerned a case brought to court by a prominent doctor in Britain against her husband in which she accused him of raping their 7-year-old daughter, Hillary. The father - also a medical doctor - denied the charges and alleged that his wife had kidnapped their daughter, hidden her and prevented him from seeing her. The Court ruled against the wife and ordered her imprisonment for 2 years on the charge of hiding the girl. However the wife did not give up and presented a videotape to the Court in which the young girl recounts how her father raped her. The husband accused his wife of insanity and said she had taught the girl what to say. Some judges in

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318 Dr. Muhammad Awad.• *Darasat fi al-Dina' al-Islami, (Studies in Islamic Criminal jurisprudence),* Dar Al Matbu'at al Jami'a, Alexandria, p. 4.

Europe and the States wished to give credence to such testimony especially on videotape by children. There was a tremendous uproar - as videotape is easily manipulated - on both sides of the Atlantic. The writer concluded his article in the newspaper by asking what jurists in the Arab world thought of the situation and whether courts can accept a child's testimony on tape?

I wrote an article on this topic also published in AI Sharq al Awsat newspaper on 13.10.1410H and I quote from it: "As a student of *Shari 'ah* and law and as a member of the judiciary for nearly 15 years, I write to answer in order to show the good points of Islamic *Shari 'ah,* that are missing in Europe and the States. The story of Hillary leads to two questions: To whom goes the trusteeship or guardianship of the child? And secondly: Is a child testimony acceptable in court?

In the first case, Islamic *Shari 'ah* is advanced in this field, just as in other parts of Islamic jurisprudence. For Islamic *Shari 'ah,* the ideal situation is that both parents take care of the child; however if they were to be separated for any reason, then the child goes to a woman who takes care of him/her, whether she be the mother, the grandmother; a sister or an aunt. The child must remain in the care of a woman until such time as he/she can take care of himself/herself and without her assistance. The woman is more capable than the man in taking care of a child at this age for the patience and tenderness. Allah has endowed her with such qualities that are not prevalent in men. The child may be a baby in need of breast-feeding and she provides him with that, and she can stay at home, whereas a man is obliged to go to work. That was the opinion of early jurists.

Later-day jurists considered that a boy child could do without a woman's care at the age of 7 and a girl at the age of 9, according to the details in books of jurisprudence. Should the mother be unable to take charge of the child then whoever follows her in *Shari 'ah* order takes charge of him, provided that person is honest, of good character and mind, able to take care of the child and not married to a man who is a stranger to the child. The religion of that person is no obstacle to her taking charge of the child be she Christian or Jewish and her Muslim husband cannot terminate her guardianship of the child because her religion is different from his. That is Islamic jurists' opinion.

Once the child is able to discern, he is given the choice between father and mother *according* to the opinion *of* the two Imams Ash-Shafi'i and Ahmad Ibn Hanbal. It is said that a woman came to the Prophet (Pbuh) and complained

that her husband wished to take their son away with him. The Prophet turned to the child and said, this is your father and this is your mother. Take the hand of whomever you want to be with. The child took his mother's hand and she left with him. The other two Imams Malik and Abu Hanifa said that a child cannot chose and this incident concerned the Prophet only and he prayed that Allah may guide the choice of the child who chose his mother but it cannot be used to generalize the issue. Should we take the opinion of the child then rulings can be issued depending on children's opinions and that is not sound.

Family laws in Arab countries as a rule supported this latter preference of the two Imams Malik and Abu Hanifa. Some stipulated that the right of guardianship comes to an end for a boy at age 10 and a girl at age 12. The judge may extend that to 15 years for a boy and until marriage for a girl. (Article 7 of the amended family law for Muslims in Egypt.) Others state 7 years for a boy and 9 for a girl unless the judge decides otherwise. (Article 67 of the Tunisian family law.)

Article 65 of the Algerian family law stipulates 10 years for the boy and marriage age for the girl. The judge can extend guardianship to the boy until age 16 if the mother has not married again.

Article 102 of the Moroccan law stipulates guardianship for a girl until she marries[319] and for a boy until maturity. Article 123 of the Jordanian family law and article 146 of the Syrian law put the age limit at 9 years for the boy and 11 for the girl.

The Iraqi law gave the judge the right to extend guardianship without any age limit (para 5 of article 57) while other laws gave the mother the right until the maturity of the boy and until marriage for the girl (article 194 of the Kuwaiti law.)

Thus we can see that Hillary 7 years old .and according to Islamic jurisprudence should stay with her mother. The father cannot take her away if the mother is of good character and has the other conditions for a child's guardian. Following that the child is there given to his guardian, the father or grandfather or uncle if he be of sound mind and able to take good care of the

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319 Imam Malik's theory. (Until the girl marries), Moroccan Law is probably based on this view.

child. If he be of ill character and repute, irresponsible, the child shall not be given to him, no matter how close the degree of relationship may be.

As to the second question: Should a child's testimony be accepted in court?

Article 92 of the criminal code of Egypt stipulates that all the rules accepted legally for witnesses in civil matters shall also apply in penal matters unless stipulated otherwise. (al-Mawsu'ah al-Jina'iyyah, volume 2, page 274.) Most Arab countries apply the same ruling. The rule for testimony in civil matters does not differ much from *Shari ah* conditions. One of the conditions to accept testimony is that the witness be mature, of sound mind, just and able to understand and convey what he saw, able to speak and witness to the event. If the witness is blind and the testimony does not necessitate seeing an event, then his testimony is acceptable, according to some jurists. The witness should be Muslim. The testimony of non-Muslims concerning each other is acceptable.

Thus the testimony of the child Hillary cannot be accepted against her father for she is not mature and because the hostility between the parents is suspect and prevents credence being given to the testimony of a child. It could be false whether given in court or recorded on videotape where it is easy to teach, threaten or otherwise manipulate a child and record the testimony.

We have seen such cases in the courts where the mother – if she fears not Allah - can teach her child fabricated words devoid of any truth. The father too can do the same thing, if he fears not Allah.

Yet, rape can be proven in other scientific ways and by the testimony of medical experts. The accused is asked, if he admits the action imputed to him. If he confesses the court may be satisfied with the confession and without hearing witnesses, as stipulated in Article 274 of the Criminal Procedures law of Egypt. If the accused denies the accusation – as happened in this case - then legal proof should be sought, medical reports and witnesses and any other steps the court may deem necessary. If such proof is not available then the charges are dismissed. If rape is proven by a father on his daughter, then he shall not have the guardianship of the girl and he shall receive a prison sentence, in accordance with British law.

In Islamic *Shari 'ah if* the crime *of* rape is proven his punishment is another-that American and European societies do not accept- namely death.[320] In 1989 the United Nations held its conference on the "Right *of* the Child - Para 3 *of* Article 21 referred to ("al Kafala" in Islamic Law.)

When the University of Lyon (France) held its World Conference on 11.5.1416H / 6.10.1995 attended by representatives from universities in Europe, Asia, North and South America, I was the only Muslim to attend that conference. Many participants talked to me *of* al kafala in Islamic law- they had learnt *of* it from the UN conference, which adopted it in support *of* care *of* the child. Professors from Holland, from Argentina and the Czech Republic talked to me *of* kafala, for which I was happy. On the other hand, I told them that there were many other good points in Islamic *Shari 'ah,* which could solve a number *of* problems in society, but that those were unknown to them due to our shortcomings *of* not translating our Muslim heritage.

On this occasion, I would like to propose that Islamic societies and organizations such as the Islamic Development Bank translate some *of* these sources *of* Islamic jurisprudence into English such as Al Mughni, Ash Sharh al Kabir, Sharh Fath al Qadir, etc. or any other source which contains sufficient detail about Islamic legislation to inform the world *of* the great wealth *of* jurisprudence that we have.

Islamic jurisprudence and legislation were never given the chance to fully participate in life in general and especially in civil legislation. Had they had the opportunity they would have proven their value as they did in earlier times.

Contribution of Islamic *Shari'ah* to Criminal Law

A source *of* pride for all Muslims is the fact that Islam comprised sufficient systems for the society, whether economic, social or political, in addition to organizing the relation between man and his Creator. Criminal legislation is a part *of* Islamic legislation. Many think that Islamic criminal legislation is solely based on penalties, though basically Islam aims at educating the individual and correcting his path - it provides for forgiveness in the event *of* human errors and the possibility *of* repentance. However *if* these

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320 *Ash Sharq al Awsat* Newspaper, 13.10.1410H.

lessons be not learned and if there is insistence on ill conduct or malice and the commitment of crime, then punishment is the medicine.

Allah imposed al Qisas (retaliation) in the Glorious Qur'an: *(Oh Believers! Qisas is prescribed for you when there is murder; a free man for a free man, a slave for a slave, and a woman for a woman. And for him who is forgiven somewhat by his brother, then prosecution according to usage and payment unto him in kindness. This is alleviation and mercy from Allah! If he still transgresseth after this, then will he suffer great pain.)*[321]

And then again: *(there is life for you in retaliation 0 men of understanding, that ye may learn to ward off evil)!* 322

The wisdom in imposing Qisas is to maintain the life and security of the society, in addition to justice by retribution from the murderer who killed an innocent being deliberately. His punishment is to uproot him from society and protect people from his evil.

In addition to Qisas there are the crimes of *"hudud". Al Hadd* in Arabic means the prescribed punishment in accordance with the *Shari 'ah* - So both *qisas* and *al diyah* (payment in retribution) are among *hudud.*

The crimes to which *hudud* are applied:

1. *Al hiraba oral muharaba i.e.,* highway robbery
2. Theft or simple robbery
3. Adultery
4. Slander (malicious accusation)
5. Rebellion
6. Apostasy
7. Heresy

The details in explanation of each of these crimes require a great deal of time- it is there in all the books *of figh. So* I shall just confine myself to the Qisas**.**

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321 *Surah al Baqara:* 178.
322 *Surah al Baqara,* 179.

Allah in His wisdom when He decreed *al qisas* wanted to protect society from evil doers and killers.

Grounds that Prevent Application *of Al Qisas*

In Islamic criminal legislation there are enough details that honour all Muslims and give them pride among nations. Not every killer should be killed - the punishment of Qisas is applied if the killer deliberately and with premeditation committed murder and even that is not a general rule. These are reasons that can prevent al Qisas- if one of them is valid then it can obstruct al Qisas. However not all jurists are agreed on them; some of these reasons have been upheld by consensus while others are upheld by only a few.

Generally the reasons are:

1. If the murdered be part of the murderer, such as a father killing his son, for the Prophet has said: " You and your property belong to your father".

2. If a Muslim kills a non-Muslim as Malik and Ash-Shafi'i thought. Abu Hanifa considered that there was no difference as the texts of the Qur'an are general.

3. If a Muslim kills an enemy at war *(harbi)* who has converted to **Islam but who has remained in the abode of war *(dar al-harb.)***

4. If the killing be the result of a mistake, in which case the killer pays compensation and is not punished by death.

5. If there be reconciliation between the killer and the family of his victim.

6. If the family of the victim, or only one of them, forgive, then al Qisas is not exacted- instead there is *diyah* or retribution payment. The basis is the ayah from the Qur'an quoted at the beginning of this chapter; and as recounted by Anas Ibn Malik: I have always seen the Prophet ordered forgiveness when a matter concerning Qisas was put to him.

7. If a group kill one then there is lack of equality and we have referred to it in *masalih mursala;* the sound procedure is that a

group may be killed for killing one person as was ordered by the Caliph `Umar b. al-Khattab.

This is a summary of the philosophy of Islamic legislation in respect one crime only-murder. The murderer must be put to death if there be none of the reasons that obstruct such a punishment as we have referred to in general. That is a just punishment.

Many thinkers of the Italian school criticized the death penalty for murderers. Montesquieu (1689-1757) in his book on the spirit of laws strongly· attacked death as a deterring punishment... Jean Jacques Rousseau (1712-1773) in his book "Le Contrat Social" called for penalties limited to the interests of the society. Lambroso (1835-1909) brought a new theory, which is to pay attention to the criminal, his physical characteristics and the circumstances surrounding him. When we studied this theory in the Faculty of law, Baghdad University, this theory was a source of derision on our part. What has the shape of a man's head, or the breadth of his forehead to do with his criminal action? The Muslim cannot link his belief in his Creator and Lambroso's theory.

However, the death punishment for the murderer was a subject of controversy and resistance on the part of many Western thinkers. I do not blame them really for they do not have Islamic legislation to base themselves on. As a result of this objection many governments did away with the death penalty such as Italy; Germany, Switzerland, New Zealand and Britain. Yet France, Spain, Russia, and some States in the United States maintained it.

The Muslim can only support the death penalty as retaliation for deliberate killing as Allah ordained and the Prophet said. The situation, in which countries that prohibited the death penalty find themselves in, is the best proof of the benefits of such a penalty and its effect on the society. Official statistics in the U.S.A. indicate that there is a murder committed every 27 minutes.

What is the use of maintaining alive a criminal who has deliberately killed one or more persons? Why should the State spend money to keep him alive in prison to think and plan other crimes, as we have seen many criminals do?

Casey, a criminal in the U.S.A -white Christian man- killed 32 young boys. He used to take them to his house, sexually assault them, kill them and

bury them in his garden. After the 32"nd victim the police arrested him in 1980. He confessed his crimes and showed the police the bodies in his garden.[323]

There was a fourteen year long trial for Casey and whenever the date for the death penalty approached his lawyer objected and presented appeals. Finally in June 1994, Casey was put to death and society was rid of him.

Another criminal Dhamir did even, worse.. He killed 18 boys after sexually attacking them, then he cut their bodies in pieces, ate their flesh, took out their hearts and put them in his refrigerator. He used to take the children from Illinois to Wisconsin for a very good reason; Illinois has the death penalty whereas Wisconsin does not. However it has life imprisonment. He received 18 life imprisonment sentences- in other words a total of more than 400 years in prison! What is the use of keeping him alive – he confessed every single one of his crimes!

At any rate some time after another prison inmate killed Dhamir-for reasons not elucidated. Was it a quarrel between inmates? Did one of the fathers of those boys have him killed? No one really knows. Another criminal in Russia confessed to killing 52 people.

Those who criticize Islamic legislation because it has the penalty of Qisas do not merit attention. Qisas for a killer is only justice and it leads to lesser crime.

There are also those who criticize flogging and that too does not command credibility. Flogging for adultery was referred to in the Glorious Qur'an and in the *Sunnah.* There are many benefits in flogging -.instead of the state *spending* money on the criminal in prison, he is punished immediately by flogging the number of times to be decided by the judge for crimes outside *hudud* offences. The physical pain suffered by the criminal may be a strong deterrent.

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323 In 1982 the World Council of Churches in New York invited me to give a lecture on *Islamic Shari 'ah. I* mentioned Casey and said Islam would have imposed *Qisas* on him through the death penalty. I criticized American newspapers and how prejudiced they were against Islam If a bank is robbed and One of the robbers is named Abdullah or Muhammad, it is all of Islam that is on trial. In the newspapers of the Arab world no newspaper is covering the Casey trial, attacked Christianity because Casey is a Christian. There were many questions and comments, but somehow no one said anything about this matter.

Some non-Islamic governments benefited from Islamic criminal legislation and introduced the punishment of flogging in their criminal code such as Singapore. We all remember a young American named Fay who lived in Singapore. The police arrested him as he was paint-spraying cars in the street. He was sentenced to 5 strokes of the whip and a prison term. The American media took up the case and expressed outrage at the idea of flogging. Several attempts were made to interfere with the sentence but the Government of Singapore insisted on the flogging but reducing them to 3 times only. When Fay finally arrived in the United States he was immediately hailed as a hero and appeared on several TV programs. He admitted his crime but criticized the punishment that he and his society are not used to.

Islamic legislation was not given the chance to be applied in civil courts instead of civil law; neither did it replace criminal law in criminal courts. However, all the Arab states apply the death penalty. Many do not apply the penalty of cutting off the hand of the thief, but simply imprison him according to Western laws.

Thus, we can say that the contribution of Islamic legislation to criminal law was limited and modest even though it is perfectly capable of contributing to it further and enriching it.

It is the law about which Allah said: *(This day have I perfected your religion for you, and completed My favor unto you and have chosen for you ISLAM as your religion)*[324]

324 ***Surah*** *Al Ma'ida, 3.*

POSSIBILITY OF THE APPLICATION OF ISLAMIC *SHARI'AH* AND ASPIRATIONS OF MUSLIMS

In Chapter One we showed the meanings of *tashri'* (law making) and mentioned its sources in detail. Then in Chapter Two we discussed the philosophy of *Shari 'ah* in certain matters, and dealt with the extent of its contribution to the science of civil law and criminal law. We would like to add, in this connection, that the question (Can Islamic *Shari 'ah* be applied in modem times?) is completely out of place. The reason for this is that Islamic *Shari 'ah* is practical, realistic, does not place unbearable burdens on the people, does not place them in any hardship, as we have already mentioned. Thus, such a question implies doubt or lack of knowledge of the nature of Islamic Shari 'ah. This *Shari 'ah* and its general principles come from Allah Almighty while many of the details and branches come from the *ijtihad* (informed opinion) of the early Muslim *faqihs* (scholars.) The question, which I would like to draw attention to, is: Are all Muslims obligated to emulate one scholar in particular? And the answer is that there is no obligation whatsoever to do so. Thirty-five years ago, I wrote saying that: Doubtless the judge should be granted full freedom to select the judgment which he deems relevant to Islam, without being obligated to pass judgment within the limitations of one sect, not exceeding it and moving onto another sect, even if it deviates from the correct judgment. For Allah Almighty is more merciful than to confine the Truth and the Right within the sayings and teachings of one of the four Imams or one single *faqih.*

Clearly and indisputably the emulation of one sect by all Muslims is not obligatory. However, what is obligatory is the evidence delineated in the Qur'an and *Sunnah.* The commentator of "Musallam Ath-Thubut" said in this context: "Emulation is likened to making a new *Shari* 'ah" *adding:* "The evidence of this fact lies in that the varying opinions of the scholars render the text more lenient and makes it amenable to Allah's creatures. For if we were obligated to abide by a particular sect, it would have been too stringent and binding".[325]

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325 Ala' *Eddine* Kharufa: Sharh Oanun al-AhwaI al-Shakhsiyyah (In explanation of Civil Status *Law) No:* 188/959. Al `Ani Press, Baghdad, 1381H/1962, vol.1, p. 42. Also see: *Musallam AI-Thubut Fi Usul Al Fiqh together with al-Ghazali, Al* Mustasfa, 2/401.

I myself have endeavoured to form an informed opinion *(ijtihad)* and said: "It seems that the quest for *Ijtihad* has waned in recent times. The erudite are satisfied with emulating without venturing into the vast realms of *Ijtihad,* by whose means Islam becomes suitable for all times and places; and without which it comes to a standstill whereas it is forever modern, and does not keep pace with the times whereas it is the only successful cure for all times. Their excuse is the saying by some of them that `The door of *ljtihad* has been closed". Nobody closed the door to *Ijtihad,* nor prevented people from practicing it, except those minds, which refuse to obey Allah's commands, as well as those of His Messenger. Those people do not want to listen to the opinions of the great Islamic scholars or to evolve according to the evolution of Islamic *Fiqh.*

Any . person knowledgeable of the conditions of *Ittihad,* as put forward in the science of the fundamentals *(usul)* of *Shari 'ah, will* find that they are very easy conditions. Scholars of *Usul* said that the *mujtahid* should be knowledgeable in three matters: 1.The Qur'an 2.The *Sunnah* 3.Procedures of *Al Qiyas.*

As regards the Qur'an, the person should be knowledgeable of its meanings- both in language *and Shari 'ah-* as well as its sections. It is not necessary to be knowledgeable of all the verses, but it is sufficient to know the verses which contain the judgments, which Al Ghazali and Ibn Al-Arabi said were five hundred. It is not necessary to learn them off by heart, but it is sufficient to be familiar with them and to know where to find them when one wants to refer to them.

As for the *Sunnah,* a Muslim jurisprudent should be knowledgeable of its text and transmission, with *hadiths* related to rulings, which are about 500, as some scholars say. These have to be available, if not memorized.

As regards the procedures of *al qiyas,* he should be knowledgeable of *al qiyas* and its conditions, what is reasonable and what is doubtful, whereby his conclusions would be correct.

Thus, we find that the conditions for *Ittihad* are easier than they were in the past. For one thing, the *hadiths* are written in a number of books, and they have been diligently classified into corroborated sound *(sahih),* good

(hasan), weak *(da* 'if) etc., which doubtless provide tremendous help to the person who finds in himself the ability and the desire to tread the path.[326]

In this context, I would like to quote Ibn Hazm who said: "If we find a quote by one of the Companions for example, we should not necessarily be bound by it, because they themselves had varying views".[327]

I would like to reiterate, however, that Muslims should respect all *faqihs,* especially the four Imams. They should benefit from all their opinions, and not confine themselves to one scholar. Islam is not rigid and Islamic *Shari 'ah* should come foremost and should be heard. Muslims should always bear in mind the Words of Allah to the effect: *(But no, by your Lord, they can have no faith, until they make you (0 Muhammad) judge in all disputes between them, and find in themselves no resistance against your decisions, and accept (them) with full submission.)*[328]

The hopes of Muslims are forever aspiring to the day when Islamic *Shari 'ah* is applied, when the entire Islamic *Ummah* comes under one banner, with one system of education and one currency. On that day, the Muslim would be able to travel with his identity card to all corners of the Islamic world in conformity with Allah's Words: *(Truly! This, ummah of yours is one nation, and I am your Lora therefore worship Me {Alone}),* [329] *and (Then, they will say: " When will that be? " Say: "perphas it is near)"*[330]

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326 !bid, 1, 43-44.
327 Ibn Hazm, p.1.
328 *Surah Al- Nisa', 65.*
329 *Surah Al Anbiya ', 92.*
330 *Surah Al- Isra ', 51.*

LIST OF SOURCES

1. The Glorious Qur'an.
2. *Ash'Shafi'i,* Muhammad Ibn Idriss, *Ahkam Al Qur 'an,* Dar Al Qalam, First Edition.
3. At-Tabari, Abu Ja'far Muhammad Ibn Jarir, *Jami 'Al Bayan 'An Ta'wee/ Ayul Qur 'an,* Dar al Mi'rifah, Beirut, Fourth Edition, 1401H/1980.
4. Abu Bakr Muhammad Ibn al `Arabi, *Ahkam* Al Qur'an, Dar al Mi'rifah, Beirut, 1408H, 1987.
5. Al Qurtubi, Abu Abdullah Muhammad Ibn Ahmad, *Al Jami ' Li Ahkam Al Qur'an,* Dar al Kitab al Arabi, Beirut, Third Edition, 1388H, 1967.
6. Al Sa'adi, Abdul Rahman Ibn Nasser, *Taysir Al Karim Al Rahman fi Tafsir Kalam Al Mannan,* Dar al Ifta', Al Riyadh, 1410H.
7. As-Zarkashi, Badrul *Din* Muhammad Ibn Abdullah, *Al Burhan fi 'Ulum Al Qur'an,* Al Maktaba al `Asriya, Sidon, Lebanon, vol.2.
8. Al Allusi, Abu Al Fadl Shihabud-Din As-Said Mahmud Al Allusi Al Baghdadi, *Ruh Al Ma 'ani fi Tafseer Al Qur* 'an *Al Azim wa Al Sabi Al Mathani, Dar Al Fikr...*
9. As-Suyuti, Jallal Al *Din,*
   a. *Al Itqan fi 'Ulum Al Qur'an,* Al Maktaba al Thagafia, Beirut,1404H/ 1983
   b. *Al Ashbah wal Nadha 'ir fi Qawa 'id wa Fiqh Ash- Shaft 'iyya,* Dar Al Kutub al `Ilmiyya, Beirut, 1403H/1983, p. 60.
   c. *Tarikh (History) of Al Khulafa',* Dar Al Qalam al Arabi, Aleppo, 1413H/993.
10. D. Saleh, Sobhi, *Mabaheth fi 'Ulum Al Qur 'an,* Dar Al `Ilm Lil Malayyin, Beirut, Second Edition, 1385H.
11. Al Bukhari, Muhammad Bin Ismail, *SahihAl Bokhari.*
12. Muslim, Muslim Ibn Al Hajjaj Al Qusheiri, *Sahli :Muslim,* Dar Al *Hadith,* Cairo, 1412H/1991.
13. An Nasal, Ahmad Ibn Shu'ib, Dar Ar-Rayyan lil Turath, Cairo
14. Al Tirmidhi, Muhammad Ibn `Isa Ibn Sawrah, *Sunan At-Tirmidhi wa huwa Al Jami ' As-Sahih, Dar Al Fikr,* Beirut,1400H/ 1980.

15. Ibn Majah, Muhammad Ibn Yazid AI Qazwini, *Sunan Ibn Maja,* annotated by Muhammad Fu'ad Abdul Baqi, AI Maktabba al'Ilmiyya, Beirut.

16. Al `Asgalani, Ahmad Ibn Ali Ibn Hajar, *Fath Al Bari bi sharh Sahih Al Bukhari,* Imam Abi Abdullah Muhammad Ibn Ismail Al Bokhari, annotated by Moheb Eddin Al Khatib and Muhammad Fuad Abdul Baqi, Dar Ar-Rayyan Lil Turath, Al Maktabbah As -Salafiyya, 1407H.

17. Al `Azim Abadi, Abi Al Tayyeb Muhammad Shams ul Hak, *'Awn Al Ma 'bud Sharh Sunan Abi Dawud,* Dar Al Fikr, Third Edition, 1399H/1979.

18. As-San'ani, Muhammad Ibn Ismail Al Kahlani, *Subul As Sallam Sharh Bulugh al Maram Min Adilat Al Ahkam,* Dar Al Fikr, Third Edition, 1404H/1984.

19. Az-Zurqani, Sidi Muhammad Az-Zurqani, *Sharh Az-Zurqani ala Muwatta ' Al Imam Malik,* Dar Al Fikr.

20. Almobara Kfury, Muhammad AbdulRahman, *Tuhfet Al Ahwadhi bi Sharh Jami ' At-Tirmidhi,* Al Maktaba as-Salafiyya, *Madinet* Munawwarah, Al I'timad Printing house.

21. As-Sarakhsy, Shams ul *Din, Kitab Al Mabsut,* Dar Al Mi'rifa, Beirut.

22. Al Kasani, Al Imam `Ala' ul *Din* Abu Bakr Ibn Mass'ud, *Bada 'e 'A! Sana 'e fi Tartib al Shara 'e,* Dar ul Kitab al Arabi, Beirut, Lebanon, Second Edition, 1402H/ 1982.

23. Ibn Qudama, Muwafaq ul Din, *Al Mughni,* Al Riyadh Al *Haditha* Library, Al Riyadh.

24. Ibn Qayyem Al Jawziyya:
    a. *Al Turuq Al Hukmiyyah* annotated by Muhammad Hamed Al Fiqqi, Dar al Kutub al `Ilmiyyah, Beirut, Lebanon.
    b. *l'lam al Muwagi'in* annotated by Muhammad Moheyyul *Din* Abdel Hamed, Dar al Fikr, Beirut, Lebanon, 1397H/1977.
    c. *Madarej al Salikkin,* Dar al Kitab al Arabi, Beirut, 1393H/1972.

25. High Council for Islamic Affairs (Al Majlis al A'la lil Shu'un Al Islamiya), *Mawsu 'at al Figh al Islami,* Dar al Kitab al Misri, Cairo, 1410H/1990.

26. Madkur, Muhammad *Salam, Al Fiqh al Islami, Al Madkhal wa al Amwal wa al Huqooq wa al Milkiyya wa al Uqud,* Abdullah Wahbah Library, . Second Edition, Cairo, 1376H/1955.

27. Shalaby, Muhammad Mustafa:

   a. *Al Madkhal fil Fiqh al Islami,* Al Dar al Jami'iyah, Beirut, 1405H.
   b. *Al Fiqh al Islami bayn Al Mithaliya wa Al Waqi 'iya,* Al Dar al Jami'iya, Beirut, 1403H/1982.

28. Badran Abu Al `Einein Badran, *Usul Al Fiqh,* Dar al Ma'aref, Alexandria, 1380H/1965.

29. At-Taftazani, Mas'ud Ibn `Umar, *Al Talweeh 'ala Tawdeeh,* Dar al Kutub al 'llmiya, Beirut, 1957.

30. Al Ghazali, Abu Hamed, *Al Mustasfa,* al Amiriya Printing House, Bulaq, Cairo, 1322H, with *Sharh Musallam al Thubut,*

31. Al Amidi, Seif ul *Din, Al Ihkam fi Usul Al Ahkam,* Dar al Kutub al 'Ilmiya, Beirut, Lebanon, 1406H/1985.

32. As-Sarakhsy, Abu Bakr Ibn Muhammad, *Usul As-Sarakhsy,* I'hya' al Ma'arif al No'maniya Committee, India.

33. Ash-Shawkani, Aly Ibn Muhammad, *Irshad al Fuhul,* Dar al Fikr, Damascus.

34. Abu Zahrah, Muhammad, *Usul al Fiqh,* Dar al Tiba'a al Muhamadiya, Al Azhar, Cairo.

35. Dr. Zeidan, Abdel Karim, *Al Wajiz fi 'Ilm Usul al Fiqh,* Mu'assasah ar-Risala, Beirut, Second Edition, 1987.

36. Sha'ban, Zaki ul *Din, Usul al Fiqh,* Dar al Kitab Al Jami'i.

37. Dr. Al Siba'i, Mustafa, *Al Sunnah wa Makanatuha fi Al Tashr'i Al Islami,* Al Maktab Al Islami.

38. Ash-Shafi'i, Muhammad Ibn Idris, *Ar-Risala,* annotated by Ash-Shaykh Ahmad Muhammad Shaker.

39. Ibn Hazm, Abu Muhammad Ali, *Al Ihkam fi Usul Al Ahkam,* Dar Al Afaq al Jadidah Publications, Beirut, 1400H/1980.

40. Abu Al Abbas, Shihab ul *Din, Al Muswadah,* annotated by Muhammad Moheiddin Abdel Hamid, Dar Al Kitab al Arabi, Beirut.

41. Ash-Shatibi, Abu Ishaq, *Al Muwafaqat,* Al Maktabah at Tijariyah al Kubra, Cairo.

42. Al Ezz Ibn Abdus-Salam, *Qawa'id Al Ahkam fi Masalih al Anam.*

43. Al Qarafi, Shihab ul *Din, Sharh al Mahsul,* Dar at Fikr, Cairo, 1384H/1973.

44. Zakaria, Al Birry, *Usul al Fiqh.*

45. ' `Awdah, Al Shahid Abdul Qadir:
    a. *Al Tashr'i Al Jina'i,* Muqarinan bi'l-Qanun al-Wad'i, Mu'asaset Ar-Risala (Establishment), 1406W 1986.
    b. *Al Islam wa Awda 'una al Qanuniyah,* Al Mukhtar at Islami lil Tiba'ah wa at Nashr wa at tawzi'e, Cairo, Fifth Edition, 1397/1977.

46. As-Sanhuri, Abdul Razaq Ahmad, *Al Wasit fi Sharh al Qanun al Madani al Jadid,* Dar at Nahdah at Arabia Printing House, Cairo.

47. Ibn Manzur, Muhammad Ibn Makram, •*Lisan ul Arab,* Dar Sadir, Beirut, 1990.

48. Al Khudari, Muhammad, *Tarikh al Tashr'i al Island,* Dar Ihya'e al Kutub at `Arabiya, Cairo, 1339W1920.

49. Dr. Al Qaradawi, Yussef, *Malamih al Mojtama'e al Muslim,* Wahbah Library, Cairo, First Edition, 1414H/1993.

50. Dr. Muhammad, Awad, *Derasat fi al Fiqh al Jina 'i al Islami,* Dar at Matbu'at at Jame'iya, Alexandria.

51. Al Imam Muhammad Ibn Saud Islamic University, *Wujub Tatbik al Shari 'ahh Al Islamia wa Al Shubuhat alati tuthar* Haw/ Tatbigiha,Riyadh, 1404W 1984.

52. Kharufa, Ala' ul *Din*
    a. *Nazarat fi Al Islam,* Al Najah Press, Bagdad, 1380H/1960.
    b. *Sharh Qanun al Ahwal al Shakhsia,* Al Ani Press 1382H/1962.
    c. *Fi Al Kawmia wal 'Ilmaniya wal Ridda wal Fa 'ida al Ribaweya,* Tripoli, Lebano**n, 1404H/1992.**

ISLAMIC DEVELOPMENT BANK

Establishment of the Bank

The Islamic Development Bank is an international financial institution established in pursuance of the Declaration of Intent issued by a Conference of Finance Ministers of Muslim Countries held in Jeddah in Dhul Qadah 1393H, corresponding to December 1973. The Inaugural Meeting of the Board of Governors took place in Rajab 1395H, corresponding to July 1975, and the Bank formally opened on the 15th Shawal 1395H, corresponding to 20th October 1975.

Purpose

The purpose of the Bank is to foster the economic development and social progress of member countries and Muslim communities individually as well as jointly in accordance with the principles of *Shari 'ah.*

Functions

The functions of the Bank are to participate in equity capital and grant loans for productive projects and enterprises besides *providing* financial assistance to member countries in other forms for economic and social development. The Bank is also required to establish and operate special funds for specific purposes including a fund for assistance to Muslim communities in non-member countries, in addition to setting up trust funds.

The Bank is authorized to accept deposits and to raise funds in any other manner. It is also charged with the responsibility of assisting in the promotion of foreign trade, especially in capital goods, among member countries, *providing* technical assistance to member countries, extending training facilities for personnel engaged in development activities and undertaking research for enabling the economic, financial and banking activities in Muslim countries to conform to the *Shari 'ah*..

Membership

The present membership of the Bank consists of 53 countries. The basic condition for membership is that the prospective member country should be a member of the Organization of the Islamic Conference and be willing to accept such terms and conditions as may be decided upon by the Board of Governors.'

Capital

The authorized capital of the Bank is six billion Islami Dinars. The value of Islami *Dinar*, which is a unit of account in the Bank, is equivalent to one SDR (Special Drawing Right of the International Monetary Fund.) The subscribed capital of the Bank is now 3654.78 million Islamic Dinars payable in freely convertible currency acceptable to the Bank.

Head Office

The Banks principle office is in Jeddah in the Kingdom of Saudi Arabia and the Bank is authorized to establish agencies or branch offices elsewhere.

Financial Year

The Banks financial year is the lunar Hijra Year

Language

The official language of the Bank is Arabic, but English and French are additionally used as working languages.